TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1611~~. 1620. ~~1646~~ 381

THE OLD NATIONAL BANK OF EVANSVILLE, INDIANA, PLAINTIFF IN ERROR,

vs.

THE GERMAN-AMERICAN NATIONAL BANK OF PEORIA, ILLINOIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED FEBRUARY 10, 1891.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and ninety, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

THE GERMAN-AMERICAN NATIONAL BANK OF PEORIA, ILLINOIS,
vs.
THE OLD NATIONAL BANK OF EVANSVILLE, INDIANA. } 8435. Civil Action.

Be it remembered that heretofore, to wit, at the May term of said court, on the 20th day of August, 1888, before the Honorable William A. Woods, judge as aforesaid of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Paxton and Warrington, John A. Holman, and Duncan, Smith and Wilson, its attorneys, and files its complaint herein in the words following, to wit:

The German-American National Bank of Peoria, Illinois, a citizen of the State of Illinois, brings this its complaint against The Old National Bank of Evansville, Indiana, a citizen of the State of Indiana, and says that it is a corporation organized under an
2 act of Congress of the United States known as An act to provide a national banking currency, and acts amendatory thereof and supplemental thereto, and as such is a citizen of Illinois, and that the said Old National Bank of Evansville, Indiana, is a corporation organized under an act — Congress of the United States known as An act to provide a national banking currency, and acts amendatory thereof and supplemental thereto, and as such is a citizen of the State of Indiana.

Complainant further says that on the 14th day of June, 1887, it owned a bill of exchange drawn by the Great Western Distilling Company, of date of June 14th, 1887, to the order of Weston Arnold, its cashier, on the Terre Haute Distilling Company of Terre Haute, Indiana, for the sum of $6,926.15, and that on said day it sent said bill of exchange to the Fidelity National Bank of Cincinnati, Ohio, for collection, and that the same was endorsed as follows: "Pay Fidelity National Bank of Cincinnati, Ohio, or order, for collection for German-American National Bank of Peoria, Illinois. Sig., W. Arnold, cashier."

Complainant further says that the said bill of exchange, with said endorsement thereon, was transmitted to said Fidelity National Bank of Cincinnati, Ohio, for collection.

Complainant further says that the said Fidelity National Bank received said draft in due course of mail, and immediately after receipt thereof sent it for collection to the Old National Bank of Evansville, Indiana, and said Old National Bank of Evansville for-

warded said draft for collection to the First National Bank of
3 Terre Haute, at Terre Haute, Indiana, and the said draft was paid to said last-named bank by the Terre Haute Distilling Company and duly remitted and accounted for to the said defendant, and the defendant ever since said time has been in possession of the proceeds of said draft and has not remitted the same to said Fidelity National Bank or to this complainant.

Complainant further says that on the 20th day of June, 1887, said Fidelity National Bank of Cincinnati was a corporation existing under and by virtue of an act of Congress of the United States of America known as An act to provide a national currency, and acts amendatory thereof and supplemental thereto, — on said last-named day and for a long time prior *thereafter* had been carrying on business of a national bank, by authority of said act of Congress, in the city of Cincinnati, Ohio.

Complainant further says that at the close of banking hours on the 20th day of June, 1887, the Comptroller of the Currency, by virtue of the power vested in him by said act of Congress, took possession of all the property and assets of said bank, and thereupon said bank suspended operation, and that thereafter, to wit, on the 27th day of June, 1887, one David Armstrong was duly constituted and appointed by the Comptroller of the Currency, in pursuance of said act of Congress, receiver of said bank, and duly qualified as such.

Complainant further says that said Comptroller of the Currency, on or about the — day of July, 1887, caused proceedings to be instituted in a court of competent jurisdiction to forfeit the charter
of said Fidelity National Bank and to dissolve said corpora-
4 tion, and such proceedings have been had in that behalf that said Fidelity National Bank has been dissolved and all its rights and franchises forfeited.

Complainant further says that the assets and resources of and liabilities to said Fidelity National Bank or of its said receiver will not be sufficient to pay in full claims of all the creditors thereof.

Complainant further says that the defendant, The Old National Bank of Evansville, Indiana, did not advise the said Fidelity National Bank of the collection of said draft and its possession of the proceeds thereof until the 26th day of July, 1887, at which time the said Fidelity National Bank had ceased to do business and the receiver thereof had been duly appointed and said corporation dissolved by a decree duly rendered in the United States circuit court for the southern district of Ohio.

Complainant further says that upon ascertaining that said defendant had collected said draft and had it in its possession, the proceeds thereof amounting to the sum of $6,926.15, it duly requested and demanded of the said defendant that it pay over to the complainant the proceeds of said draft so collected as aforesaid, amounting to the said sum of $6,926.15, which the said defendant refused to do.

Complainant further says that there is due to it from the said defendant by reason of the premises the sum of $6,926.15, with interest thereon from the 21st day of June, 1887.

Wherefore complainant asks judgment against the said defendant for the sum of $6,926.15, with interest thereon from the said 21st day of June, 1887.

PAXTON AND WARRINGTON,
JOHN A. HOLMAN,
DUNCAN, SMITH AND WILSON,
Attorneys for Plaintiff.

And afterwards, to wit, at the May term of said court, on the 29th day of August, 1888, in recess of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by McDonald, Butler and Snow, its attorneys, and enters its appearance herein.

And afterwards, to wit, at the May term of said court, on the 6th day of October, 1888, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by McDonald, Butler and Snow, its attorneys, and files its answer herein in the words following, to wit:

1st. The defendant, for first paragraph of answer to the complaint herein, denies each and every allegation thereof.

2d par. The defendant, for second paragraph of answer to the complaint of the plaintiff herein, says that the bill of exchange in said complaint mentioned was payable at sight, and, in addition to the endorsement by the plaintiff to the Fidelity National Bank of Cincinnati, Ohio, set out in the complaint, and subsequent thereto, was endorsed by said Fidelity National Bank to The Old National Bank of Evansville, Indiana, the defendant herein, by an endorsement in the words and figures following, to wit:

"Pay Old National Bank, Evansville, Ind., cashier, or
6 order, for collection. Please report by this number—66,923.
Fidelity Nat'l Bank, Cincinnati, Ohio. Ammi Baldwin, cashier;" and was by said Old National Bank of Evansville, the defendant herein, endorsed to the First National Bank of Terre Haute, which endorsement was in the words and figures following, to wit: "Pay H. S. Deming, cashier, or order, for collection for acc't of the Old National Bank of Evansville, Ind. Henry Reis, cashier."

And the defendant further avers that said bill of exchange was forwarded by the plaintiff herein, endorsed by the plaintiff, as above mentioned, to the said Fidelity National Bank, to said Fidelity National Bank, with instructions that it was forwarded for collection and credit, and that said bill of exchange was forwarded by said Fidelity National Bank, endorsed by said Fidelity National Bank as above mentioned, to the said Old National Bank of Evansville, the defendant herein, with instructions that it was forwarded for collection and credit, and that said bill of exchange was forwarded by the said Old National Bank, the defendant herein, endorsed as above mentioned, to the said First National Bank of Terre Haute, with instructions that the same was forwarded for collection and

credit; and the defendant further avers that said bill of exchange was forwarded by said Fidelity National Bank and said Old National Bank prior to the 20th day of June, 1887, and was received by the First National Bank of Terre Haute on or prior to the 20th day of June, 1887, and that said bill of exchange was paid on said 20th day of June before the close of banking hours by the Terre Haute
7 Distilling Company to the said First National Bank of Terre Haute and the proceeds thereof immediately paid by said First National Bank of Terre Haute to itself.

And the defendant further avers that prior to the commencement of this action the said First National Bank fully paid and satisfied its indebtedness to the said Old National Bank of Evansville, the defendant herein, arising by reason of the collection of said bill of exchange, and that prior to the commencement of this action the said Old National Bank of Evansville fully paid and satisfied its indebtedness to the said Fidelity National Bank arising by reason of the collection of said bill of exchange.

3d par. The defendant, for third paragraph of answer to the complaint of the plaintiff herein, says that the bill of exchange in said complaint mentioned was payable at sight, and, in addition to the endorsement by the plaintiff to the Fidelity National Bank of Cincinnati, Ohio, set out in the complaint, and subsequent thereto, was endorsed by said Fidelity National Bank to the Old National Bank of Evansville, Indiana, the defendant herein, by an endorsement in the words and figures following, to wit: "Pay Old National Bank of Evansville, Ind., cashier, or order, for collection. Please report by this number—66923. Fidelity Nat'l Bank, Cincinnati, Ohio. Ammi Baldwin, cashier;" and was by said Old National Bank of Evansville, the defendant herein, endorsed to the First National Bank of Terre Haute, which endorsement was in the words and figures following, to wit: "Pay H. S. Deming, cashier, or order, for collection for acc't of the Old National Bank of Evansville, Ind. Henry Reis, cashier."

8 And the defendant further avers that on the 14th day of June, 1887, it was and long previously had and ever since has been the custom and usage among banks of the States of Iowa, Indiana, and Ohio and of the banks throughout the United States for a bank receiving payment of commercial paper endorsed to it for collection to pay the amount so received to itself and to become indebted to the next preceding endorser at the date and time of such payment, and for a bank receiving commercial paper endorsed to it for collection and endorsing for collection and transmitting the same to another bank to become indebted to the next preceding endorser, such indebtedness becoming absolute and final at the date and time when such paper is actually paid to the party holding the same.

And the defendant further avers that said custom was, on the said 14th day of June, 1887, known to the plaintiff herein and to the said Fidelity National Bank and to the said Old National Bank of Evansville, the defendant herein, and to the said First National Bank of Terre Haute, and that the plaintiff herein and the said Fidelity National Bank mutually conducted their business in ac-

cordance with the said custom, and that the said Fidelity National Bank and the said Old National Bank of Evansville, the defendant herein, mutually conducted their business in accordance with said custom, and that the said Old National Bank of Evansville, the defendant herein, and the said First National Bank of Terre Haute mutually conducted their business in accordance with said custom.

And the defendant further avers that said bill of exchange
9 was forwarded by the plaintiff herein, endorsed by the plaintiff, as above mentioned, to the said Fidelity National Bank, to the said Fidelity National Bank, with instructions that it was forwarded for collection and credit, and that said bill of exchange was forwarded by said Fidelity National Bank, endorsed by said Fidelity National Bank as above mentioned, to the said Old National Bank of Evansville, the defendant herein, with instructions that it was forwarded for collection and credit, and that said bill of exchange was forwarded by the said Old National Bank, the defendant herein, endorsed as above mentioned, to the said First National Bank of Terre Haute, with instructions that the same was forwarded for collection and credit; and the defendant further avers that said bill of exchange was forwarded by said Fidelity National Bank and said Old National Bank prior to the 20th day of June, 1887, and was received by the First National Bank of Terre Haute on or prior to the 20th day of June, 1887, and that said bill of exchange was paid on said 20th day of June before the close of banking hours by the Terre Haute Distilling Company to the said First National Bank of Terre Haute and the proceeds thereof immediately paid by the said First National Bank of Terre Haute to itself.

And the defendant further avers that the said First National Bank of Terre Haute, prior to the commencement of this action, fully paid and satisfied its indebtedness to the said Old National Bank of Evansville arising by reason of the collection of said bill of exchange, and that the said Old National Bank, prior to the commencement of this action, fully paid and satisfied its indebtedness
to said Fidelity National Bank arising by reason of the
10 collection of said bill of exchange.

4th par. The defendant, for fourth paragraph of answer to the complaint of the plaintiff herein, says that the bill of exchange in said complaint mentioned was payable at sight, and, in addition to the endorsement by the plaintiff to the Fidelity National Bank of Cincinnati, Ohio, set out in the complaint, and subsequent thereto, was endorsed by said Fidelity National Bank to the Old National Bank of Evansville, the defendant herein, by an endorsement in the words and figures following, to wit: "Pay Old National Bank, Evansville, Ind., cashier, or order, for collection. Please report by this number—66923. Fidelity Nat'l Bank, Cincinnati, Ohio. Ammi Baldwin, cashier;" and was by said Old National Bank of Evansville, the defendant herein, endorsed to the First National Bank of Terre Haute, which endorsement was in the words and figures following, to wit: "Pay H. S. Deming, cashier, or order, for collection for acc't of the Old National Bank of Evansville, Ind. Henry Reis, cashier."

And the defendant further avers that on the 14th day of June, 1887, it was and long previously had and ever since has been the custom and usage among banks of the States of Iowa, Indiana, and Ohio and of the banks throughout the United States for a bank receiving payment of commercial paper endorsed to it for collection to pay the amount so received to itself and to become indebted to the next preceding endorser at the date and time of such payment, and for a bank receiving commercial paper endorsed to it for collection and endorsing for collection and transmitttng the same
11 to another bank to become indebted to its next preceding endorser, such indebtedness becoming absolute and final at the date and time when such paper is actually paid to the party holding the same.

And the defendant further avers that it was on the 14th day of June, 1887, and long previously had and ever since has been the custom and usage among such of said banks as are engaged in the business of collecting and forwarding for collection mercantile paper for and in behalf of each other to repay to each other the indebtedness arising by reason of the payment of mercantile paper held for collection by debiting and crediting to each other the amounts of indebtedness arising in their mutual collection accounts, the amount paid on such paper becoming a debit or credit item in such mutual collection account as of the date and time of the payment of such paper, and, further, that it was on said 14th day of June, 1887, and long previously had and ever since has been the custom and usage between banks that when commercial paper endorsed to a bank for collection is endorsed for collection to another bank with which the endorsing bank has a mutual collection account the said paper becomes a debit and credit item in such collection account between said banks as of the date and time of such payment to the party holding the same at the time of payment; and the defendant further avers that such custom was on the 14th day of June, 1887, known to the plaintiff herein and to the said Fidelity National Bank and to the defendant herein and to the said First National Bank of Terre Haute.

12 And the defendant further avers that on said date and long previously the plaintiff herein and the said Fidelity National Bank had mutually conducted their business in accordance with said custom, and on said day had and long previously had had a mutual collection account with each other in which the amounts of collections were debited and credited between the plaintiff herein and the said Fidelity National Bank; and the defendant further avers that the bill of exchange in the complaint mentioned and described was transmitted to the said Fidelity National Bank by the plaintiff herein, endorsed by the plaintiff herein in the manner above mentioned, with instructions that the same was to be credited to the plaintiff by said Fidelity National Bank on the said mutual collection account.

And the defendant further avers that on said date and long previous-ly the said Fidelity National Bank and the defendant herein conducted their business in accordance with said custom, and on

said day had and long previously had had a mutual collection account with each other in which the amounts of collections were debited and credited between the said Fidelity National Bank and the said Old National Bank; and the defendant further avers that the bill of exchange in the complaint mentioned and described was transmitted to said Old National Bank by the said Fidelity National Bank prior to the 20th day of June, 1887, endorsed by the said Fidelity National Bank in the manner above mentioned, with instructions that the same was to be credited to the Fidelity National
13 Bank by said Old National Bank of Evansville, the defendant herein, on their said mutual collection account.

And the defendant further avers that on said date and long previously the defendant herein and the said First National Bank of Terre Haute had mutually conducted their business in accordance with said custom, and on said day had and long previously had had a mutual collection account with each other in which the amounts of collections were debited and credited between the defendant herein and the said First National Bank of Terre Haute; and the defendant further avers that the bill of exchange in the complaint mentioned and described was transmitted by itself to the said First National Bank of Terre Haute prior to the 20th day of June, 1887, endorsed by the defendant in the manner above mentioned, with instructions that the same was to be credited to the defendant by the said First National Bank of Terre Haute on their said mutual collection account.

And the defendant further avers that said bill of exchange was received by the said First National Bank of Terre Haute on or prior to the 20th day of June, 1887, and was paid by the said Terre Haute Distilling Company to said First National Bank of Terre Haute on the 20th day of June, 1887, before the close of banking hours, and the proceeds thereof were immediately paid by said First National Bank of Terre Haute to itself and immediately became and was a debit and credit item in said mutual collection account as between said First National Bank of Terre Haute and the defendant
14 herein and as between the defendant herein and said Fidel-ty National Bank and as between the Fidelity National Bank and the plaintiff herein.

And the defendant further avers that prior to the commencement of this action the said First National Bank of Terre Haute fully paid and satisfied its indebtedness to the defendant herein arising by reason of the collection of said bill of exchange, and that prior to the commencement of this action the defendant herein fully paid and satisfied its indebtedness to the said Fidelity National Bank arising by reason of the collection of said bill of exchange.

Wherefore, by reason of the foregoing and by reason of each of the foregoing paragraphs of answer, the defendant prays judgment for costs.

McDONALD, BUTLER AND SNOW,
Attorneys for Defendant.

And afterwards, to wit, at the November term of said court, on

the 4th day of March, 1889, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Mess. McDonald, Butler and Snow, its attorneys, and files its 5th and 6th paragraphs of answer herein in the words following, to wit:

Par. 5th. The defendant, for a 5th paragraph of answer to the complaint of the plaintiff herein, alleges that the bill of exchange in said complaint mentioned was payable at sight, and, in addition to the endorsement by the plaintiff to the Fidelity National Bank of Cincinnati, Ohio, set out in the complaint, and subsequent
15 thereto, was endorsed by said Fidelity National Bank to The Old National Bank of Evansville, Indiana, the defendant herein, by an endorsement in the words and figures following, to wit:

"Pay Old National Bank, Evansville, Ind., cashier, or order, for collection. Please report by this number—66923. Fidelity Nat'l Bank, Cincinnati, Ohio. Ammi Baldwin, cashier;" and transmitted by the said Fidelity Bank to the defendant herein, with instructions and upon the agreement and understanding that the same was for collection and credit.

And the defendant further alleges that the defendant endorsed the same to the First National Bank of Terre Haute, Indiana, by an endorsement in the words and figures following, to wit: "Pay H. S. Deming, cashier, or order, for collection for acc't of the Old National Bank of Evansville. Henry Reis, cashier;" and transmitted the same to the said First National Bank of Terre Haute, with instructions and upon the agreement and understanding that the same was for collection and credit.

And the defendant further alleges that said bill of exchange was forwar-ed as aforesaid by the said Fidelity National Bank and said Old National Bank prior to the 20th day of June, 1887, and was received by the said First National Bank of Terre Haute on or prior to the 20th day of June, 1887, and that said bill of exchange was paid to said First National Bank of Terre Haute on said 20th day of June, 1887, before the close of banking hours on said day by the said Terre Haute Distilling Company, the drawee of said bill of exchange.

16 And the defendant further alleges that, in accordance with an agreement and understanding entered into between the plaintiff herein and the said Fidelity National Bank, and a similar agreement and understanding entered into between the said Fidelity National Bank and the defendant, and a similar agreement and understanding entered into between the defendant and the said First National Bank of Terre Haute, the plaintiff herein kept and had a mutual and reciprocal collection account with the said Fidelity National Bank, and said Fidelity National Bank kept and had a mutual and reciprocal collection account with the defendant herein, and the defendant herein kept and had a mutual and reciprocal collection account with said First National Bank of Terre Haute, and that said mutual and reciprocal collection accounts were had

and kept between said banks on the 14th day of June, 1887, and long prior thereto, and were had and kept continuously until the failure of said Fidelity National Bank.

And the defendant further alleges that, in accordance with the aforesaid agreement and understanding between said banks, the amount due at maturity upon paper deposited or paper held by said banks for collection was credited to the bank from which such paper was received and debited to the bank receiving the same, said credit and debit becoming an absolute credit and debit item in said collection account as of the time and date of the maturity and payment of such paper to the party holding the same at its maturity.

17 And defendant further alleges that the note in question was received, endorsed, and transmitted by the plaintiff, by the said Fidelity National Bank, and by said First National Bank of Terre Haute in accordance with the above-mentioned understanding and agreement relating to the manner of doing collection business between said banks, and that on the 20th day of June, 1887, when said note was paid, as above stated, the amount collected on said note was paid by said First National Bank of Terre Haute to itself and credited absolutely by it on their mutual collection account with the defendant, and by reason of such payment and credit the amount of said note immediately, at the instant of such payment and credit, became an absolute debit and credit item in the mutual collection account between said First National Bank and the defendant herein, and in the mutual collection account between the defendant herein and the Fidelity National Bank, and in the mutual collection account between the Fidelity National Bank and the plaintiff herein.

And defendant further alleges that prior to the commencement of this action the said First National Bank of Terre Haute fully paid and satisfied its indebtedness to the defendant herein by reason of the collection of said bill of exchange, and that prior to the commencement of this action the defendant herein fully paid and satisfied its indebtedness to the said Fidelity National Bank arising by reason of the collection of said bill of exchange.

Par. 6th. The defendant, for a 6th paragraph of answer, alleges that the bill of exchange referred to in said complaint was payable

18 at sight, and, in addition to the endorsement by the plaintiff to the Fidelity National Bank of Cincinnati, Ohio, set out in the complaint, and subsequent thereto, was endorsed by said Fidelity National Bank to The Old National Bank of Evansville, the defendant herein, by an endorsement in the words and figures following: "Pay Old National Bank, Evansville, Ind., cashier, or order, for collection. Please report by this number—66923. Fidelity Nat'l Bank, Cincinnati, Ohio. Ammi Baldwin, cashier."

The defendant further alleges that the defendant herein endorsed the same to the First National Bank of Terre Haute by an endorsement in the words and figures following, to wit: "Pay H. S. Deming, cashier, or order, for collection for acc't of the Old National Bank of Evansville, Ind. Henry Reis, cashier."

And the defendant further alleges that on the 14th day of June,

1887, it was and long previously had and ever since has been the custom and usage among the banks of the States of Illinois and Indiana and of the banks throughout the United States for a bank receiving payment of commercial paper endorsed to it for collection to pay the amount so received to itself and to become indebted to the next preceding endorser at the date and time of such payment, and for the bank receiving commercial paper endorsed to it for collection and endorsing for collection and transmitting the same to another bank to become indebted to its next preceding endorser, such indebtedness becoming absolute and final at the date and time when such paper is actually paid to the party holding the same.

And the defendant further alleges that it was on the 14th day of June, 1887, and long previously had and ever since has been
19 the custom and usage among such of said banks as are engaged in the business of collecting and forwarding for collection mercantile paper for and in behalf of each other to keep mutual and reciprocal collection accounts with each other and to pay to each other the indebtedness arising by reason of the payment of mercantile paper held for collection by debiting and crediting to each other the amounts of indebtedness so arising in their mutual collection accounts, the amount paid on such paper becoming a debit and credit item in such mutual collection account as of the date and time of the payment of such paper; and, further, that it was, on said 14th day of June, 1887, and long previously had and ever since has been, the custom and usage between banks that when commercial paper endorsed to a bank for collection is endorsed for collection to another bank with which the endorsing bank has a mutual collection account that such paper becomes a debit and credit item in such collection account between said banks as of the date and time of such payment to the party holding the same at the time of payment.

And the defendant further alleges that such custom was, on the 14th day of June, 1887, known to the plaintiff herein and to the said Fidelity National Bank and to the defendant herein and to the said First National Bank of Terre Haute.

And the defendant further alleges that on said date and long previously and afterwards the plaintiff herein and the said Fidelity
National Bank mutually conducted their business in accord-
20 ance with said custom, and on said day had, and long previously and afterwards had, in pursuance of a mutual agreement and understanding, a mutual and reciprocal collection account with each other, in which the amounts of collections were debited and credited between the plaintiff herein and the said Fidelity National bank in the manner above mentioned.

And the defendant further alleges that the bill of exchange in the complaint mentioned and described was transmitted to the said Fidelity National Bank by said plaintiff herein, endorsed by the plaintiff herein in the manner above mentioned, with instructions and upon the agreement and understanding that the same was for collection and was to be credited to the plaintiff by the Fidelity National Bank in their mutual collection account.

And the defendant further alleges that on said date and long previously and afterwards the said Fidelity National Bank and the defendant herein conducted their business in accordance with said custom, and on said day had, and long previously and afterwards had, in pursuance of a mutual agreement and understanding, a mutual and reciprocal collection account with each other, in which the amounts of collections were debited and credited between said Fidelity National Bank and the said Old National Bank; and the defendant further alleges that the bill of exchange in the complaint mentioned and described was transmitted to said Old National Bank by the Fidelity National Bank, endorsed by the said Fidelity National Bank in the manner above mentioned, with instruc-
21 tions and upon the agreement and understanding that the same was for collection and was to be credited to the Fidelity National Bank by said Old National Bank of Evansville, the defendant herein, on their said mutual collection account.

And the defendant further alleges that on said date and long previously and afterwards the defendant herein and the said First National Bank of Terre Haute had mutually conducted their business in accordance with said custom, and on said day and long previously and afterwards had, in pursuance of a mutual agreement and understanding, a mutual and reciprocal collection account with each other, in which the amounts of collections were debited and credited between the defendant herein and the said First National Bank of Terre Haute; and the defendant further alleges that the bill of exchange in the complaint mentioned and described was transmitted by itself to the said First National Bank of Terre Haute, endorsed by the defendant in the manner above mentioned, with instructions and upon the agreement and understanding that the said — was for collection and was to be credited to the defendant by the said First National Bank of Terre Haute on their said mutual collection account.

And the defendant further alleges that said bill of exchange was paid by the said Terre Haute Distilling Company, the drawee thereof, to said First National Bank of Terre Haute on the 20th day of June, 1887, before the close of banking hours, and the amount col-
22 lected on said bill of exchange was immediately paid by said First National Bank of Terre Haute to itself and credited absolutely by said First National Bank of Terre Haute on its mutual collection account with the defendant, and by reason of such payment and credit immediately, at the instant of such payment and credit, became and was a debit and credit item in the mutual collection account as between said First National Bank of Terre Haute and the defendant herein and as between the defendant herein and said Fidelity National Bank and as between the Fidelity National Bank and the plaintiff herein.

And the defendant further alleges that prior to the commencement of this action the said First National Bank of Terre Haute fully paid and satisfied its indebtedness to the defendant herein by reason of the collection of said bill of exchange, and that prior to the commencement of this action the defendant herein fully paid

and satisfied its indebtedness to the said Fidelity National Bank arising by reason of the collection of said bill of exchange.

Wherefore, by reason of the foregoing and by reason of each of the foregoing paragraphs of answer, the defendant prays judgment for costs.

McDONALD, BUTLER & SNOW,
Attorneys for Defendant.

And afterwards, to wit, at the November term of said court, on the 11th day of April, 1889, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Paxton and Warrington,
23 John A. Holman, and Duncan and Smith, its attorneys, and files its reply herein in the words following, to wit:

The plaintiff, for reply to the several paragraphs of answer herein other than the first, denies each and every material allegation therein contained.

PAXTON AND WARRINGTON,
JOHN A. HOLMAN,
DUNCAN & SMITH,
Att'ys for Pl'ff.

And afterwards, to wit, at the May term of said court, on the 7th day of September, 1889, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Messrs. McDonald, Butler and Snow, its attorneys, and, by leave of court and with the consent of the plaintiff, filed its 7th paragraph of answers herein in the words following, to wit:

Par. 7th. The defendant, for a 7th paragraph of answer to the complaint of the plaintiff herein, alleges that the bill of exchange in said complaint mentioned was payable at sight, and, in addition to the endorsement by the plaintiff to the Fidelity National Bank of Cincinnati, Ohio, set out in the complaint, and subsequent thereto, was endorsed by said Fidelity National Bank to The Old National Bank of Evansville, Indiana, the defendant herein, by an endorsement in the words and figures following, to wit: "Pay Old National Bank of Evansville, Ind., cashier, or order, for collection. Please
report by this number—66923. Fidelity Nat'l Bank, Cincin-
24 nati, Ohio. Ammi Baldwin, cashier:" and transmitted by the said Fidelity Bank to the defendant herein, with instructions and upon the agreement and understanding that the same was for collection and credit.

And the defendant further alleges that the defendant endorsed the same to the First National Bank of Terre Haute, Indiana, by an endorsement in the words and figures following, to wit: Pay H. S. Deming, cashier, or order, for collection for acc't of the Old National Bank of Evansville, Ind. Henry Reis, cashier:" and transmitted the same to the said First National Bank of Terre Haute,

with instructions and upon the agreement and understanding that the same was for collection and credit.

And the defendant further alleges that said bill of exchange was forwarded as aforesaid by the said Fidelity National Bank and said Old National Bank prior to the 20th day of June, 1887, and was received by the said First National Bank of Terre Haute on or prior to the 20th day of June, 1887, and that said bill of exchange was paid to said First National Bank of Terre Haute on said 20th day of June, 1887, before the close of banking hours on said day by the said Terre Haute Distilling Company, the drawee of said bill of exchange.

And the defendant further alleges that, in accordance with an agreement and understanding entered into beeween the plaintiff herein and the said Fidelity National Bank and a similar agreement and understanding entered into between the defendant and said First National Bank of Terre Haute, the plaintiff herein kept and had a mutual and reciprocal collection account with the
25 said Fidelity National Bank, and said Fidelity National Bank kept and had a mutual and reciprocal collection account with the defendant herein, and the defendant herein kept and had a mutual and reciprocal collection account with said First National Bank of Terre Haute, and that said mutual and reciprocal collection accounts were kept and had between said banks on the 14th day of June, 1887, and long prior thereto, and were had and kept continuously until the failure of said Fidelity National Bank.

And the defendant further alleges that it was agreed by and between the said banks that all mercantile paper endorsed and transmitted between said banks should, upon its receipt for collection, be credited as cash to the bank last endorsing and transmitting the same for collection, but that if any of such mercantile paper should not be paid at maturity the amount thereof should be charged back to the bank last endorsing and transmitting the same.

And the defendant further alleges that the bill of exchange in question was received, endorsed, and transmitted by the plaintiff, by the said Fidelity National Bank, by the defendant, and by said First National Bank of Terre Haute in accordance with the above-mentioned understanding and agreement relating to the manner of doing collection business between said banks, and that the amount of the bill of exchange mentioned in the complaint herein was credited as cash when received by each of the above-mentioned banks in the mutual collection accounts between said banks to the bank from which said bill of exchange was received and by which it was last endorsed and transmitted.

And the defendant further alleges that prior to the com-
26 mencement of this action the said First National Bank of Terre Haute fully paid and satisfied its indebtedness to the defendant herein by reason of the collection of said bill of exchange, and that prior to the commencement of this action the defendant herein fully paid and satisfied its indebtedness to the said Fidelity National Bank arising by reason of the collection of said bill of exchange.

Wherefore the defendant prays judgment for costs.

McDONALD, BUTLER & SNOW,
Att'ys for Defendant.

And afterwards, to wit, at the May term of said court, on the 12th day of September, 1889, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by counsel, and files its reply herein in the words following, to wit;

The plaintiff, for reply to the answer of the defendant herein, denies each and *each and* every material allegation therein contained.

PAXTON AND WARRINGTON,
JOHN A. HOLMAN,
DUNCAN AND SMITH, *for Pl'ff.*

And afterwards, to wit, at the November term of said court, on the 12th day of January, 1891, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties and file their stipulation in writing
27 waiving a trial by jury and submitting this cause to the court for trial, finding, and judgment; which stipulation is in the words and figures following, to wit:

The parties to the above-entitled cause hereby waive a trial by jury therein and agree that the same may be set down for trial, finding, and judgment by the court.

J. A. HOLMAN,
DUNCAN AND SMITH,
Attorneys for Plaintiff.
McDONALD, BUTLER & SNOW,
Attorneys for Defendant.

Thereupon the defendant requests the court to make a special finding of the facts in the cause and to state its conclusions of law thereon.

And, the evidence having been heard as well as the argument of counsel, the court does now make its special finding of the facts in the cause and state its conclusions of law thereon as follows:

The court, having been requested upon the trial of said cause by the defendant to make a special finding of facts and to state its conclusions of law thereon, does now make the following finding of facts:

First. During the month of June, 1887, until the failure of the Fidelity National Bank of Cincinnati, Ohio, as hereinafter stated, The German-American National Bank of Peoria, Illinois, plaintiff herein, and the said Fidelity National Bank were mutually transacting the business of collecting mercantile paper each for the other and were keeping ledger accounts with each other under a contract entered

into in the month of September, 1886, which contract was contained in the following correspondence:

28 (*a.*) A letter from Ammi Baldwin, cashier of the said Fidelity National Bank, to the said German-American National Bank, of which the following is a copy, to wit:

"The Fidelity National Bank; capital, $1,000,000.00.

Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benj. E. Hopkins, ass't cashier.

CINCINNATI, *September 23rd*, 1886.

German-American National Bank, Peoria, Illinois.

GENTLEMEN: We would be pleased to have you keep all or part of your Cincinnati account with us, and submit the following proposition for your consideration.

We will credit sight items on any point in the United States east of Illinois, where there are banks, at par; and make collections on same points, which, when paid, will credit at par; also your checks upon the principal cities, allowing you two and a half per cent. on daily balances calculated when monthly statements are rendered; and will remit for your credit to New York against your balances at any time you may desire, without charge; or will ship you currency, express charges at your cost.

Believing that the arrangement would prove mutually satisfactory and that you will apply to the Comptroller to make us one of your reserve agents, we await your favorable reply.

Respectfully yours, AMMI BALDWIN."

29 (*b.*) A letter from Weston Arnold, cashier of the said German-American National Bank, in response to the foregoing letter, of which the following is a copy:

PEORIA, ILLS., *September 24th*, 1886.

Ammi Baldwin, Esq., cashier, Cincinnati, O.

DEAR SIR: In reply to your kind favor of the 23d please inform us if you expect your depositors to reciprocate by accounting for all Peoria collections at par. We have charged our regular correspondents fifty cents per $1,000.00 on collections.

Yours respectfully, WESTON ARNOLD, *Cashier*."

(*c.*) A letter from Ammi Baldwin, cashier of the said Fidelity National Bank, in response to the foregoing letter, of which the following is a copy:

CINCINNATI, O., *Sept. 25th*, 1886.

Weston Arnold, cashier, Peoria, Illinois:

We beg to thank you for favor of 24th inst., replying to our request for an account current and to offer a suggestion, and that is that you could make a good Cincinnati business and have balances of some importance by taking advantage of the unlimited field of points we offer, against which you could draw checks to

pay collections made for other banks throughout Ohio, Indiana, Kentucky, and Tennessee, which, nine months in the year, would be more acceptable to them than N. Y. exchange.

We would gladly send you our Peoria items, which we
30 should expect to have credited at par, that being only a fair offset upon your part for the advantages you have with us.

Trusting that you will give this matter favorable consideration, as we very much desire to have a correspondent in your city, and that we may hear from you with a deposit, which we believe will grow to be an account large and satisfactory to both banks, we remain,

Respectfully yours, AMMI BALDWIN, *Cashier*."

(*d*.) Letter from Weston Arnold, cashier of the said German-American National Bank, in response to the foregoing, enclosing draft of $3,000.00, of which letter the following is a copy:

PEORIA, ILLS., *Sept. 27th*, 1886.

Ammi Baldwin, cashier, Cincinnati, Ohio.

DEAR SIR: Your favor of the 25th inst. received, and we beg to enclose for this bank's credit, subject to check, our No. 69114, National Bank of Illinois, Chicago, for $3,000.00.

Yours respectfully, WESTON ARNOLD."

The draft enclosed in the last-copied letter was for the purpose of opening the account.

Second. After the opening of the account the said Fidelity National Bank sent a rubber stamp prepared for stamping an endorsement on paper transmitted for collection from the said German-American National Bank to the said Fidelity National Bank,
31 a copy of the impression made by which stamp is as follows:

"Pay Fidelity Nat'l Bank of Cincinnati, O., or order, for collection for German-American Nat'l Bank of Peoria, Ills.

W. ARNOLD, *Cash*."

Third. On June 14th, 1887, the said German-American National Bank purchased from the Great Western Distilling Company of Peoria a draft by it drawn on the Terre Haute Distilling Company of the City of Terre Haute, Indiana, for the sum of $6,926.15, of which the following is a copy:

Great Western Distilling Co., distillers and refiners of spirits.

$6,926.15. PEORIA, ILLS., *June 14th*, 1887.

At sight pay to the order of Weston Arnold, cashier, sixty-nine hundred twenty-six $\frac{15}{100}$ dollars.

J. B. GREENHUT,
Sec. and Treas.

To Terre Haute Distilling Co., Terre Haute, Ind.
No. 4357.

Fourth. On the same day (June 14th, 1887) the said German-American National Bank transmitted said draft to the said Fidelity National Bank in a letter, of which the following is a copy:

PEORIA, ILLS., *June 14th*, 1887.

Ammi Baldwin, Esq., cash., Cin'ti, O.

DEAR SIR: Enclosed find for collection and credit items
32 as stated below.

Respectfully yours, WESTON ARNOLD, *Cashier.*

Return at once if unpaid, giving reasons; protest all paper unless otherwise instructed.

Terre Haute Dist. Co.----------No pro.----------$6,926 15"

Fifth. Said draft was at the time of its said transmission indorsed by the German-American National Bank by the use of the rubber stamp above described, as follows:

Pay Fidelity National Bank of Cincinnati, O., or order, for collection for German-American Nat'l Bank of Peoria, Ills.

W. ARNOLD, *Cash.*"

Sixth. When the said German-American National Bank bought said draft the entries made upon the books of the bank were: the Great Western Distilling Company were credited with the amount thereof, less the discount, and cash was charged with the like amount, less discount.

Seventh. When the said German-American National Bank transmitted said draft thus endorsed to the said Fidelity National Bank it credited cash with the full amount of said draft and charged same to the said Fidelity National Bank in its ledger account with said bank as a debit against the said Fidelity National Bank.
33 Said entries were made in pursuance of the right which the plaintiff then claimed and ever since has claimed to have under its said contract and the custom of bankers to enter, at the time of transmission, sight paper transmitted to the said Fidelity National Bank for collection upon its ledger account with the said Fidelity National Bank, and were provisional in that the plaintiff at the time of making said entries intended to exercise its right which it then claimed and ever since has claimed to have under its said contract with the said Fidelity National Bank and the custom of bankers to cancel each of said entries by a counter-entry in case said draft was not paid. Said entries were not communicated to the said Fidelity National Bank. Said draft was also before its said transmission to said Fidelity National Bank entered on the remittance register of the said German-American National Bank as remitted to the said Fidelity National Bank.

Eight. The said German American National Bank never at any time drew drafts upon the said Fidelity National Bank against collections transmitted until after it had received from the said Fidelity National Bank notice of payment thereof.

Ninth. Upon receipt of said draft by the said Fidelity National Bank, which was on the 15th day of June, 1887, no entry representing said draft was made by the said Fidelity National Bank in its general ledger account with the said German-American National Bank, but in certain instances on former occasions sight items, indorsed by the said German-American National Bank in the
34 same manner as the draft in question, had been, upon their receipt and before their further transmission for collection, entered by the said Fidelity National Bank on its general ledger account as a credit in favor of the said German-American National Bank.

Tenth. Said draft was, prior to its transmission to the Old National Bank, as hereinafter stated, entered in the collection register (or, as it was called by the said Fidelity National Bank, the collection ledger) of the said Fidelity National Bank as having been received from the said German-American National Bank on June 15th, 1887, and sent to the Old National Bank of Evansville, Indiana, the defendant herein, on June 16th, 1887.

The following is a copy of the headings of the collection register, or collection ledger, of the said Fidelity National Bank and the entries made thereon relating to said draft:

Date forwarded: June 16, 1887.
No: 66923.
Depositor: Ger. Am., Peoria, Ills.
Date of letter or No.: 6, 14.
Payer: Dist. Co., Terre Haute, Ind.
To whom sent: Old Evansville.
Term and maturity: Sight.
Amount: 6,926.15.
Date of charge and credit: ——.

Eleventh. Said draft was, before its transmission to said Old National Bank, as hereinafter stated, entered by the said Fidelity National Bank upon a book kept by it, designated as "National Banks, Collection Credits," the headings of which and entry of draft in this case being as follows:

National Banks, Collection Credits.

German-American National Bank, Peoria, Ills.

2-13		$6,926 15	$6,926 15

35 Twelfth. Said draft was also, before its transmission to said Old National Bank, as hereinafter stated, entered by the said Fidelity National Bank upon a book kept by it, designated "National Banks, Collection Charges," the headings of which and entry of draft in this case being as follows:

National Banks, Collection Charges.

"Old National Bank, Evansville, Ind.

"61,158	16 65
"66,923	6,926 15
"63,314	51 84
	$6,994 64"

Thirteenth. The said draft was, upon its transmission to said Old National Bank, as hereinafter state-, endorsed by the said Fidelity National Bank as follows: "Pay Old National Bank, Evansville, Ind., cashier, or order, for collection. Please report by this number, 66923. Fidelity National Bank, Cincinnati, O. Ammi Baldwin, cashier," and was then forwarded to the said Old National Bank in a letter of which the following is a copy:

CINCINNATI, 6, 16, 1887.

Old National Bank, —— ——, Esq., cashier, Evansville, Ind.

DEAR SIR: I enclose for collection and credit as below stated.

Very respectfully yours,

AMMI BALDWIN, *Cashier.*

67,004	No	pro.			39 94
66,954	"	"			10 67
23	"	"	B. L.		6,926 15
843	"	"			30 38
1	"	"			140 46
36 35	Miller				609 00
14	No	pro.			87 00
125,353	"	"			5 46
4	"	"			1 29
473	"	"			1 83
420	"	"			35 50
03	"	"			17 13

Do not hold, but protest against all collections not accepted or paid, unless otherwise instructed by us. Advise by date of letter. Please report collections by numbers."

Fourteenth. During the month of June, 1887, until the failure of the said Fidelity National Bank, as hereinafter stated, the said Fidelity National Bank and the said Old National Bank, defendants herein, were mutually transacting the business of collecting mercantile paper, each for the other, and were keeping ledger accounts with each other, under a contract entered into in the month of July, 1886, which contract was contained in the following correspondence:

(*a*.) A letter from the said Fidelity National Bank to the said Old National Bank, of which the following is a copy:

CINCINNATI, *July 8th*, 1886.

Old National Bank, Evansville, Ind.

GENTLEMEN: We desire a reciprocal account in your city that will keep a credit balance with us. We will credit all items not on your list at par and allow you two and a half per cent. on daily balances, calculated with monthly statements, and remit New York for your credit any time you desire, free of charge.

37 We would be pleased to hear from you promptly and to receive your par list.

Respectfully, E. L. HARPER, *V. P.*"

(*b*) A letter from the said Old National Bank in response to the foregoing, of which the following is a copy:

EVANSVILLE, IND., *July 9th*, 1886.

E. L. Harper, Esq., V. pres't, Cincinnati, O.:

Your favor of yesterday is received, and in reply we would say that we could not agree to keep any very large balance to our credit with you, except perhaps in the summer, for the reason that we have full use for all our means, and of course it would not pay us to hold money comparatively idle simply for the purpose of a balance in your city. We say this frankly because we do not desire to disappoint you in this respect. We have a large country correspondence in this part of this State, Kentucky, and Illinois, and collect without charge, and we receive from them items upon almost every point, and many of them we send to Cincinnati for credit. We might and I think we can be useful to you in many ways. We have only one bank in your city holding a balance for us, and we might in time give you part of it. We know that you always expect more from country banks like ours than their means allow them to do, and, being sensible of this fact, we confess our poverty. If you conclude to send us your collections we shall do the best we can, and if we meet your expectations we shall be disappointed ourselves.

38 Very truly yours, SAM. BAYARD, *Pres't.*"

Dictated.

(*c*) A letter from the said Fidelity National Bank in response to the foregoing, of which the following is a copy:

CINCINNATI, *July 13th*, 1886.

Sam. Bayard, Esq., pres't, Evansville, Ind.

DEAR SIR: We are in receipt of your valued favor of the 9th inst. and note contents with thanks. We send you our first letter to-day, and trust you will be able to send us enough city and foreign items to keep the balances even. We will credit your Louisville, St. Louis, and Chicago exchange at par, as well as nearly every other point in the U. S.

Respectfully yours, E. L. HARPER, *V. P.*"

Fifteenth. Upon receipt of said letter of June 16th, 1887, from the said Fidelity National Bank with enclosure, the saide Old National Bank mailed a postal card to the said Fidelity National Bank, of which the following is a copy:

EVANSVILLE, IND., *June 18th*, 1887.

I have received your favor of the 16th, with stated enclosure. Entered for coll.

Yours respectfully, HENRY REIS, *Cashier.*

Which postal card was addressed to "Ammi Baldwin, Esq., cashier, Cincinnati, O.," and was duly received by said Fidelity National Bank. "Entered for coll." meant and was understood by
39 all parties to the correspondence to mean "Entered for collection."

Sixteenth. By the uniform practice of the said Old National Bank under its said contract with the said Fidelity National Bank, all mercantile paper received for collection by the said Old National Bank from the said Fidelity National Bank was entered, upon its receipt by the said Old National Bank, upon the collection register of the said Old National Bank, and was entered upon the ledger account of the said Old National Bank as a credit to the said Fidelity National Bank, in case such paper was transmitted for collection to another bank, after payment of the paper and notification thereof received from the bank to which such paper was transmitted. The Fidelity National Bank was designated in such collection register as the "depositor" of such paper.

Seventeenth. Upon the receipt of said draft by the said Old National Bank, which was on the 17th day of June, 1887, no entry representing said draft was made by the said Old National Bank in its ledger account with the said Fidelity National Bank, but said draft was, prior to its transmission to the First National Bank of Terre Haute, as hereinafter stated, entered in the collection register of the said Old National bank as having been received from the said Fidelity National Bank on June 17th, 1887, and sent to the said First National Bank on June 18th, 1887.

The following is a copy of the headings of the collection register of the said Old National Bank and of the entries therein relating to said draft:

40 Date of dep.: June 17, 1887.
No.: 33151.
Depositor: Fidelity Nat. Bank, Cin., O.
Drawer: Great Western Dis. Co.
Endorser: W. Arnold, cash'r.
Payer: Terre Haute Dist. Co.
Where payable: Terre Haute.
Date of letter: 16.
Their No.: 66923.
Date of bill: June 14.
Time: 8't.

When due: ——.
Amount: 6,926.15.
Int. or exc.: ——.
Pro. or no pro.: No pro.
When paid: June 20.
Remarks: Credited.

Eighteenth. The said Old National Bank, on June 18th, 1887, which was Saturday, transmitted said draft to the said First National Bank, endorsed by the said Old National Bank as follows: "Pay H. S. Deming, cash'r, or order, for collection for acc't of the Old National Bank of Evansville, Ind. Henry Reis, cashier." Said draft was enclosed in a letter of which the following is a copy:

EVANSVILLE, IND., *June 18th*, 1887.

H. S. Deming, Esq., cashier, Terre Haute, Ind.:

I enclose, as stated below, for coll. & cr.

Very respectfully, HENRY REIS, *Cashier*.

33,151	T. H. Dist'g Co.	No pro.	86,926	15	—B. L.
33,157	Keyes Mf'g Co.	No pro.	17	13	
33,155	Rooney Tr.	No pro.	1	83	
33,154	Reese	No pro.	87	00	"

The abbreviation "coll. and cr." in said letter stood for the words "collection and credit," and was so understood by the said Old National Bank and the said First National Bank.

Nineteenth. During the month of June, 1887, the said Old National Bank and the said First National Bank were mutually transacting the business of collecting mercantile paper, each for the other, and were keeping mutual and reciprocal collection and
41 ledger accounts with each other, said mutual and reciprocal collection business having been transacted and said mutual and reciprocal collection and ledger accounts having been kept continuously by said banks since February, 1885, and the debit balances arising as the result of the collection and other business between said banks having been settled periodically since February, 1885, by remittances of money or exchange by the debtor bank to the creditor bank.

Said draft was transmitted by said Old National Bank and received by the said First National Bank as a part of the regular and usual mutual and reciprocal collection business between said banks.

By the uniform practice of the said First National Bank with respect to sight paper payable at Terre Haute, received by it for collection from the said Old National Bank, and which was a part of the regular and usual mutual and reciprocal collection business between said banks, such sight paper was not entered in the collection register of the said First National Bank.

By the uniform practice of the said First National Bank with respect to all other mercantile paper received by it for collection from the Old National Bank, and as a part of the regular and usual mu-

tual and reciprocal collection business between said banks, such paper was entered in the collection register, in which the Old National Bank was described as the "depositor" of such papers.

By the uniform practice of the said First National Bank with respect to all paper received by it for collection from said Old National Bank as a part of regular and usual mutual and reciprocal
42 collection business between said banks, upon its payment a credit to the amount of such paper, if paid to the First National Bank, or upon notification of its payment from the bank to which such paper was transmitted for collection, was entered upon the ledger account of the said First National Bank in favor of the said Old National Bank.

Twentieth. Said draft was received by said First National Bank on Monday, June 20th, 1887, and was not entered upon its collection register, and was paid to it by the Terre Haute Distilling Company between 2 and 3 o'clock on the afternoon of said day, and on said day after payment the amount thereof was credited to the said Old National Bank by the said First National Bank on its ledger account with the Old National Bank, said credit being in accordance with the uniform practice, as above stated, of said First National Bank with respect to mercantile paper payable in Terre Haute and paid to it, received by it for collection from said Old National Bank, and which was a part of the regular and usual mutual and reciprocal collection business between said banks.

Twenty-first. On the afternoon of said June 20th, 1887, a letter was written by the said First National Bank to the said Old National Bank, advising the latter of the payment and credit, which letter was posted at or about 4 o'clock of the same afternoon.

Twenty-second. The first mail from Terre Haute to Evansville after the posting of the said letter was scheduled to leave Terre Haute at 9:30 p. m. of the same day, and to arrive at Evansville at about 1:30 a. m. of the next day. Said letters was deliv-
43 ered to the said Old National Bank at or about eight o'clock on the morning of June 21st, 1887.

Twenty-third. During the month of June, 1887, the banking hours of the said Fidelity National Bank, the said Old National Bank, and the said First National Bank were from nine o'clock in the forenoon continuously until three o'clock in the afternoon.

Twenty-fourth. During the month of June, 1887, it was the practice, and for many years prior thereto had been the practice, of the said Old National Bank in entering upon its account books the date of each transaction to enter those transactions as occurring upon the same day which occurred between the beginning of banking hours upon one day and the beginning of banking hours on the next business day. In pursuance of said practice, the said letter having been received as aforesaid by the said Old National Bank prior to the beginning of banking hours on the said 21st day of June, 1887, the amount of said draft was by the said Old National Bank entered in its account with the said Fidelity National Bank as a credit to the said Fidelity National Bank as of June 20th, 1887.

Twenty-fifth. On said June 21st, 1887, the said Old National Bank

wrote and mailed to the said Fidelity National Bank a letter notifying the said Fidelity National Bank of the payment of said draft and the credit to the said Fidelity National Bank upon the books of the said Old National Bank, of which letter the following is a copy:

EVANSVILLE, IND., *June 20th*, 1887.

A. Baldwin, Esq., cashier, Cincinnati, O.:

44 Your acc't has credit for items as below stated.

Very respectfully, HENRY REIS, *Cashier*.

	" 89 33				
	57 00				
		Yours of the 18th inst.			
	6,926 15				
	17 13	Yours of 16th inst.			
124,595	31 68	"	" 11	"	
123,741	78 28	"	" 7	"	
66,191	22 23	"	" 11	"	
125,059	16 20	"	" 14	"	
65,954	273 92	"	" 11	"	
122,708	3,500 00	"	" 28	"	May.
124,142	441 00	"	" 9	"	
	74 36	"	" 13	"	
124,303	77 50	"	" 10	"	
	9 39	"	" 14	"	
66,132	12 20	"	" 11	"	
65,104	285 50	"	" 7	"	
66,661	74 00	"	" 15	"	

The Fidelity National Bank began to do a banking business on the — day of ——, 1886, and continued to transact banking business until its failure, as hereinafter stated.

Twenty-sixth. On June 20th, 1887, and for 10 days prior thereto the said Fidelity National Bank was insolvent, but neither the said German-American National Bank, the said Old National Bank, nor the First National Bank had knowledge of this fact, nor did

45 either of said banks have knowledge of such fact until after the failure of the said Fidelity National Bank, as hereinafter stated. On the morning of June 20th, 1887, Mr. Eugene Powell, bank examiner, came to the said Fidelity National Bank for the purpose of making an examination. He did so, to a certain extent. In the afternoon of said June 20th, 1887, the board of directors of the said Fidelity National Bank had a meeting at the office of the bank, which continued in session until after the close of banking hours. After the close of banking hours the board of directors adjourned, and immediately thereafter Mr. Powell, as bank examiner, took possession of the said Fidelity National Bank, and that night had the combination of the safe changed, of which combination he took possession. The said Fidelity National Bank kept its doors

open for the transaction of banking business until the close of banking hours on June 20th, 1887, and transacted such banking business as offered until that time. The board of directors of the Fidelity National Bank met early in the morning of June 21st, 1887, and about 8.30 o'clock, half an hour before the beginning of bank hours, it was announced to the officers of the said Fidelity National Bank that the bank would not open. The said Fidelity National Bank did not open for business on June 21st, 1887, and has never opened for business since June 20th, 1887.

Twenty-seventh. Mr. Eugene Powell, bank examiner, continued in possession of the Fidelity National Bank after taking possession of it in the manner aforesaid until June 27th, 1887, when Mr. David Armstrong was appointed receiver, which position the said Mr. Armstrong held at the beginning of this suit.

46 Twenty-eighth. On June 22d, 1887, the above-mentioned letter from the said Old National Bank to the said Fidelity National Bank, dated June 20th, 1887, was received by the persons in charge of the said Fidelity National Bank.

Twenty-ninth. No entry other than those above stated was made on the books of the said Fidelity National Bank representing said draft until July 26th, 1887. On July 23d, 1887, the said Mr. David Armstrong, the receiver of the Fidelity National Bank, caused to be mailed to the said Old National Bank a postal card, of which the following is a copy:

"CINCINNATI, O., *July 23d*, 1887.

Please report on item sent you 6, 16, on distilling Co. for $6,926.15, Terre Haute, Ind.; due sight; 66923. Return this postal in advising.

DAVID ARMSTRONG, *Rec'r.*"

To which the Old National Bank replied on the same card:

"Paid and credited your account June 20th.

HENRY REIS, *Cashier.*"

Thirtieth. After the receipt of such postal card thus returned the receiver directed the amount of said draft to be credited upon the ledger account of the said Fidelity National Bank with the said German-American National Bank in favor of the said German-American National Bank and to be charged upon the ledger account of the Fidelity National Bank with the Old National Bank to the debit of the said Old National Bank, which was done on July 26th, 1887, but under date of June 20th, 1887.

47 Thirty-first. No remittance — money or any tangible representative of money representing said draft was ever made by the First National Bank to the said Old National Bank or by the said Old National Bank to the said Fidelity National Bank or by the said Fidelity National Bank or its receiver to the said German-American National Bank, and the proceeds of said draft never passed between said banks, if at all, otherwise than by the debit and credit entries above mentioned.

Thirty-second. Prior to the institution of this suit the said Old National Bank and the said First National Bank made a mutual settlement of their collection accounts up to and including the above-mentioned entries representing said draft. The mutual collection accounts between the said Old National Bank and the said Fidelity National Bank have not been settled on account of the insolvency of said Fidelity National Bank, but the said Old National Bank claims upon such settlement the benefit of the amount of said draft as a debit on its account with the said Fidelity National Bank.

Thirty-third. On the books of the said Fidelity National Bank, as they stood at the beginning of this suit, the said Fidelity National Bank owed the said German-American National Bank $17,844.77. On the books of the said Fidelity National Bank and of the said Old National Bank, as they stood at the beginning of this suit, the said Fidelity National Bank owed the said Old National Bank $14,391.57. The above balances are made by debiting the said Old National Bank with the amount of said draft and crediting the said German-American National Bank with the amount of
48 said draft.

Thirty-fourth. The said German-American National Bank demanded payment of said sum of $6,926.15 from the said Old National Bank prior to the bringing of this action, to wit, on the 28th day of February, 1888.

Thirty-fifth. The words "for collection and credit," as used in the letters between said banks, signified and were understood by the banks between — such letters passed to signify that the mercantile paper transmitted with such instructions was to form a part of the regular and usual mutual and reciprocal collection business between the banks between which such letters passed.

Thirty-sixth. The following custom of banks exists throughout the States of Ohio, Indiana, and Illinois and throughout the United States:

Banks may and do agree to act each for the other in making collections of mercantile paper, and in cases where such arrangement exists between two banks each bank keeps a book, generally called a collection register, in which a memorandum of all paper received for collection from the other bank is entered. This custom is not observed by some banks doing a small collection business in the case of sight paper payable at the place of the receiving bank, but such failure to observe the custom is for the convenience of the receiving bank. Such memorandum is more or less complete, and sometimes contains the name of the person who appears on the face of the paper to be its absolute owner and sometimes does not. Such memorandum always contains the name of the bank from
49 which the paper was received under the heading "depositor" or some word of similar signification.

In case paper received for collection from a bank with which such an arrangement for mutual and reciprocal collection business exists is payable in or near the city or town in which the receiving bank is situated and is paid to the bank receiving the paper, the bank receiving payment, as soon as convenient after receipt of such pay-

ment, credits the amount of such paper to the bank from which such paper was received on its ledger account.

In case paper received for collection from a bank with which such an arrangement for mutual and reciprocal collection business exists is not payable in or near the city or town in which the receiving bank is situated, the bank receiving such paper, after entering the same in its collection register, transmits the same to some other bank more convenient to the place of payment of such paper. Upon receipt of the amount of such paper in money or other currency from the bank to which such bank so transmits said paper as aforesaid, or (in case the bank to which such paper is so transmitted is also transacting a mutual collection business with such transmitting bank) upon notification from such bank to which such paper has been so transmitted of payment of such paper to it and of the credit by it of the amount of such paper on its books to the transmitting bank, the original receiving bank credits the amount of such paper to the bank from which such paper was so received on its ledger account with said bank.

50 In case the paper is transmitted for collection through two or more banks having such an arrangement for doing mutual collection business consecutively, such transmitting bank, upon notification of payment and credit from the bank to which it transmitted the paper, not only credits the amount of such paper on its ledger account in favor of the bank from which it received the paper, but debits the amount of such paper upon its ledger account against the bank to which it transmitted such paper.

When mercantile paper is transmitted for collection by a bank to another bank with which it has an arrangement for doing a mutual and reciprocal collection business, such transmitting bank may, at its option, prior to such transmission, enter the amount of the paper so transmitted on its ledger account with such other bank as a credit in favor of such other bank; but in such case the entry is provisional, in that it is subject to be charged off by a corresponding debit in case such paper is not paid.

When mercantile paper is transmitted for collection between banks having such an arrangement for doing mutual and reciprocal collection business, all mercantile paper intended to be collected in pursuance of the custom of bankers and the terms of such arrangement is either endorsed by each transmitting bank "for collection and credit for account of" the transmitting bank, or is endorsed "for collection for account of" the transmitting bank, and is accompanied by a letter of advice, stating that such paper is "for collection and credit."

51 Upon the foregoing facts the court states the following as its conclusions of law:

1st. That the law of the case is with the plaintiff; to which ruling the defendant at the time excepts.

2d. That the plaintiff is entitled to recover from the defendant the said sum of $63926.15, with interest thereon, at the rate of six per cent. per annum, since the 29th of February, 1888; to which ruling the defendant at the time excepts.

The foregoing finding was prepared by counsel and embraces matters not deemed material by the court, but, being warranted by the evidence, they are inserted at the instance of counsel.

WM. A. WOODS.

To each of which conclusions of law the said defendant, The Old National Bank of Evansville, Indiana, at the time excepts.

And the court, upon request of the parties, now orders that the foregoing special finding of facts and conclusions of law be made a part of the record herein.

And thereupon the defendant presents its bill of exceptions in the words and figures following, to wit:

Bill of Exceptions.

Be it remembered that on the trial of the above cause by the court, upon the request of the defendant, the court made the following special finding of facts:

First. During the month of June, 1887, until the failure of the Fidelity National Bank of Cincinnati, Ohio, as hereinafter stated, The German-American National Bank of Peoria, Illinois, plaintiff herein, and the said Fidelity National Bank were mutually transacting the business of collecting mercantile paper each for the
52 other and were keeping ledger accounts with each other under a contract entered into in the month of September, 1886, which contract was contained in the following correspondence:

(*a.*) A letter from Ammi Baldwin, cashier of the said Fidelity National Bank, to the said German-American National Bank, of which the following is a copy, to wit:

The Fidelity National Bank; capital, $1,000,000.00.

Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benj. E. Hopkins, ass't cashier.

CINCINNATI, *September 23d*, 1886.

German-American National Bank, Peoria, Illinois.

GENTLEMEN: We would be pleased to have you keep all or part of your Cincinnati account with us, and submit the following proposition for your consideration:

We will credit sight items on any point in the United States east of Illinois, where there are banks, at par; and make collections on same points, which, when paid, will credit at par; also your checks upon the principal cities, allowing you two and a half per cent. on daily balances calculated when monthly statements are rendered; and will remit for your credit to New York against your balances at any time you may desire, without charge; or will ship you currency, express charges at your cost.

Believing that the arrangement would prove mutually satisfactory and that you will apply to the Comptroller to make us
53 one of your reserve agents, we await your favorable reply.

Respectfully yours, AMMI BALDWIN."

(*b.*) A letter from Weston Arnold, cashier of the said German-American National Bank, in response to the foregoing letter, of which the following is a copy:

PEORIA, ILLS., *September 24th*, 1886.

Ammi Baldwin, Esq., cashier, Cincinnati, Ohio.

DEAR SIR: In reply to your kind favor of the 23d please inform us if you expect your depositors to reciprocate by accounting for all Peoria collections at par. We have charged our regular correspondents fifty cents per $1,000.00 on collections.

Yours respectfully, WESTON ARNOLD, *Cashier.*"

(*c.*) A letter from Ammi Baldwin, cashier of the said Fidelity National Bank, in response to the foregoing letter of which the following is a copy:

CINCINNATI, O., *September 25th*, 1886.

Weston Arnold, cashier, Peoria, Illinois:

We beg to thank you for favor of 24th inst., replying to our request for an account current, and to offer a suggestion, and that is that you could make a good Cincinnati business and have balances of some importance by taking advantage of the unlimited field of points we offer, against which you could draw checks to pay collections made for other banks throughout Ohio, Indiana, Kentucky, and Tennessee, which nine months in the year would be more acceptable to them than N. Y. exchange.

54 We would gladly send you our Peoria items, which we should expect to have credited at par, that being only a fair offset upon your part for the advantages you have with us.

Trusting that you will give this matter favorable consideration, as we very much desire to have a correspondent in your city, and that we may hear from you with a deposit, which we believe will grow to be an account large and satisfactory to both banks, we remain,

Respectfully yours, AMMI BALDWIN, *Cashier.*"

(*d.*) Letter from Weston Arnold, cashier of the said German-American National Bank, in response to the foregoing, enclosing draft of $3,000.00, of which letter the following is a copy:

PEORIA, ILLS., *Sept. 27th*, 1886.

Ammi Baldwin, cashier, Cincinnati, Ohio.

DEAR SIR: Your favor of the 25th inst. received, and we beg to enclose for this bank's credit, subject to check, our No. 69114, National Bank of Illinois, Chicago, for $3,000.00.

Yours respectfully, WESTON ARNOLD."

The draft enclosed in the last copied letter was for the purpose of opening the account.

Second. After the opening of the account the said Fidelity National Bank sent a rubber stamp prepared for stamping an endorse-

ment on paper transmitted for collection from the said German-American National Bank to the said Fidelity National Bank,
55 a copy of the impression made by which stamp is as follows:

Pay Fidelity Nat'l Bank of Cincinnati, O., or order, for collection for German-American Nat'l Bank of Peoria, Ills.
W. ARNOLD, *Cash'r.*

Third. On June 14th, 1887, the said German-American National Bank purchased from the Great Western Distilling Company of Peoria a draft by it drawn on the Terre Haute Distilling Company of the City of Terre Haute, Indiana, for the sum of $6,926.15, of which the following is a copy:

Great Western Distilling Co., distillers and refiners of spirits.

$6,926.15. PEORIA, ILLS., *June 14th*, 1887.

At sight pay to the order of Weston Arnold, cashier, sixty-nine hundred & twenty-six & $\frac{15}{100}$ dollars.

J. B. GREENHUT,
Sec. and Treas.

To Terre Haute Distilling Co., Terre Haute, Ind.
No. 4357."

Fourth. On the same day, June 14th, 1887, the said German-American National Bank transmitted said draft to the said Fidelity National Bank in a letter, of which the following is a copy.

PEORIA, ILLS., *June 14th*, 1887.

Ammi Baldwin, Esq., cash'r, Cincinnati, Ohio.

DEAR SIR: Enclosed find for collection and credit items as stated below.

Respectfully yours, WESTON ARNOLD, *Cashier.*"

56 Return at once if unpaid, giving reasons. Protest all paper unless otherwise instructed.

Terre Haute Dist. Co. ---------- No. pro. ---- ------- $6,926 15"

Fifth. The said draft was, at the time of its said transmission, indorsed by the German-American National Bank by the use of the rubber stamp above described, as follows:

Pay Fidelity National Bank of Cincinnati, O., or order, for collection for German-American Nat'l Bank of Peoria, Ills.
W. ARNOLD, *Cash.*"

Sixth. When the said German-American National Bank bought said draft the entries made upon the books of the bank were: the Great Western Distilling Company were credited with the amount thereof, less the discount, and cash was charged with the like amount, less discount.

Seventh. When the said German-American National Bank transmitted said draft thus endorsed to the said Fidelity National Bank it credited cash with the full amount of said draft and charged same to the said Fidelity National Bank in its ledger account with said bank as a debit against the said Fidelity National Bank.

Said entries were made in pursuance of the right which the plaintiff then claimed and ever since has claimed to have under its said contract and the custom o bankers to enter, at the time of transmission, sight paper transmitted to the said Fidelity National Bank for collection upon its ledger account with the said Fidelity National Bank, and were provisional, in that the plaintiff at the time
57 of making said entries intended to exercise its right which it then claimed and ever since has claimed to have under its said contract with the said Fidelity National Bank and the custom of bankers to cancel each of said entries by a counter-entry in case said draft was not paid. Said entries were not communicatad to the said Fidelity National Bank. Said draft was entered also before its said transmission to the said Fidelity National Bank on the remittance register of the said German-American National Bank as remitted to the said Fidelity National Bank.

Eighth. The said German-American National Bank never at any time drew drafts upon the said Fidelity National Bank against collections transmitted until after it had received from the said Fidelity National Bank notice of payment thereof.

Ninth. Upon receipt of said draft by the said Fidelity National Bank, which was on the 15th day of June, 1887, no entry representing said draft was made by the said Fidelity National Bank in its general ledger account with the said German-American National Bank, but in certain instances on former occasions sight items indorsed by the said German-American National Bank in the same manner as the draft in question had been, upon their receipt and before their further transmission for collection, entered by the said Fidelity National Bank on its general ledger account as a credit in favor of the said German-American National Bank.

Tenth. Said draft was, prior to its transmission to the Old
58 National Bank, as hereinafter stated, entered in the collection register (or, as it was called by the said Fidelity National Bank, the collection *register*) of the said Fidelity National Bank as having been received from the said German-American National Bank on June 15th, 1887, and sent to The Old National Bank of Evansville, Indiana, the defendant herein, on June 16th, 1887.

The following is a copy of the headings of the collection register or collection ledger of the said Fidelity National Bank and the entries made thereon relating to said draft:

Date forwarded: 1887, June 16.
No.: 66923.
Depositor: Ger. Am., Peoria, Ills.
Date of letter or No.: 6, 14.
Payer: Dist Co., Terre Haute, Ind.
To whom sent: Old, Evansville.

Term and maturity: Sight.
Amount: 6,926.15.
Date of charge and credit: ——.

Eleventh. Said draft was, before its transmission to said Old National Bank, as hereinafter stated, entered upon a book kept by it designated as "National Banks, Collection Credits," the headings of which and the entry of draft in this case being as follows:

"*National Banks, Collection Credits.*

German-American National Bank, Peoria, Ills.

6–13	86,926 15	86,926 15"

Twelfth. Said draft was also, before its transmission to said Old National Bank, as hereinafter stated, entered by the said Fidelity National Bank upon a book kept by it designated as "National Banks, Collection Charges," the heading of which and the entry of draft in this cause being as follows:

"*National Banks, Collection Charges.*

59 Old National Bank, Evansville, Ind.

#61,158	16 65
#66,923	6,926 15
#63,314	51 84
	$6,994 64

Thirteenth. The said draft was, upon its transmission to said Old National Bank, as hereinafter stated, endorsed by the said Fidelity National Bank as follows:

"Pay Old National Bank, Evansville, Indiana, cashier, or order, for collection. Please report by this number—66923.

FIDELITY NATIONAL BANK,
CINCINNATI, OHIO.
AMMI BALDWIN, *Cashier.*"

And was then forwarded to the said Old National Bank in a letter, of which the following is a copy:

CINCINNATI, 6, 16, 1887.

Old National Bank, —— ——, Esq., cashier, Evansville, Ind.

DEAR SIR: I enclose for collection and credit as below stated.

Very respectfully yours,

AMMI BALDWIN, *Cashier.*"

67,004		No pro.		39 94
66,954		"		10 67
23		"		6,926 15
843		"		30 38
1		"		140 46
35		Miller		609 00
14		No pro.		87 00
125,353		"		5 46
4		"		1 29
473		"		1 83
60 420		No pro.		35 50
03		"		17 13

Do not hold, but protest against all collections not accepted or paid unless otherwise instructed by us. Advise by date of letter. Please report collections by numbers."

Fourteenth. During the month of June, 1887, until the failure of the said Fidelity National Bank, as hereinafter stated, the said Fidelity National Bank and the said Old National Bank, defendant herein, were mutually transacting the business of collecting mercantile paper each for the other and were keeping ledger accounts with each other under a contract entered into in the month of July, 1886, which contract was contained in the following correspondence:

(*a.*) A letter from the said Fidelity National Bank to the said Old National Bank, of which the following is a copy:

CINCINNATI, *July 8th*, 1886.

Old National Bank, Evansville, Ind.

GENTLEMEN: We desire a reciprocal account in your city that will keep a credit balance with us. We will credit all items not on your list at par and allow you two and a half per cent. on daily balances calculated with the monthly statements, and remit New York for your credit any time you desire free of charge. We would be pleased to hear from you promptly and to receive your par list.

Respectfully, E. L. HARPER, *V. P.*"

61 (*b.*) A letter from the said Old National Bank in response to the foregoing, of which the following is a copy:

EVANSVILLE, IND., *July 9th*, 1886.

E. L. Harper, Esq., V. pres't, Cincinnati, O.:

Your favor of yesterday is received, and in reply we would say that we could not agree to keep any very large balance to our credit with you, except perhaps in the summer, for the reason that we have full use for all our means, and of course it would not pay us to hold money comparatively idle simply for the purpose of a balance in your city. We say this frankly because we do not desire to disappoint you in this respect. We have a large country correspondence in this part of this State, Kentucky, and Illinois, and collect without charge, and we receive from them items upon almost every point, and many of them we send to Cincinnati for credit. We have only

one bank in your city holding a balance for us, and we might in time give you a part of it. We know that you always expect more from the country banks like ours than their means allow them to do, and, being sensible of this fact, we confess our poverty. If you conclude to send us your collections we shall do the best we can, and if we meet your expectations we shall be disappointed ourselves.

Very truly yours, SAM. BAYARD, *Pres't.*"

Dictated.

(c.) A letter from the said Fidelity National Bank in response to the foregoing, of which the following is a copy:

CINCINNATI, *July 13th*, 1886.

62 Sam'l Bayard, Esq., pres't, Evansville, Ind.

DEAR SIR: We are in receipt of your valued favor of the 9th and note contents, with thanks.

We send you our first letter to-day, and trust you will be able to send us enough city and foreign items to keep the balances even. We will credit your Louisville, St. Louis, and Chicago exchange at par, as well as nearly every point in the U. S.

Respectfully yours, E. L. HARPER, *V. P.*"

Fifteenth. Upon receipt of said letter of June 16th, 1887, from the said Fidelity National Bank, with inclosure, the said Old National Bank mailed a postal card to the said Fidelity National Bank, of which the following is a copy:

EVANSVILLE, IND., *June 18th*, 1887.

I have received your favor of the 16th, with stated inclosure, entered for coll.

Yours respectfully, HENRY REIS, *Cashier.*"

Which postal card was addressed to "Ammi Baldwin, Esq., cash'r, Cincinnati, O.," and was duly received by said Fidelity National Bank. "Entered for coll." meant and was understood by all parties to the correspondence to mean "entered for collection."

Sixteenth. By the uniform practice of the said Old National Bank under its said contract with the said Fidelity National Bank all mercantile paper received for collection by the said Old National Bank from the said Fidelity National Bank was entered, upon its receipt by the said Old National Bank, upon the collection register of the

63 said Old National Bank, and was entered upon the ledger account of the said Old National Bank as a credit to the said Fidelity National Bank in case such paper was transmitted for collection to another bank after payment of the paper and notification thereof received from the bank to which such paper was transmitted. The Fidelity National Bank was designated in such collection register as the "depositor" of such paper.

Seventeenth. Upon the receipt of said draft by the said Old National Bank, which was on the 17th day of June, 1887, no entry

representing said draft was made by the said Old National Bank in its ledger account with the said Fidelity National Bank, but said draft was, prior to its transmission to the First National Bank of Terre Haute, as hereinafter stated, entered in the collection register of the said Old National Bank as having been received from the said Fidelity National Bank on June 17th, 1887, and sent to the said First National Bank on June 18th, 1887.

The following is a copy of the headings of the collection register of the said Old National Bank and of the entries therein relating to said draft:

Date of dep.: 1887, June 17.
No.: 33151.
Depositor: Fidelity Nat. Bank, Cin., O.
Drawer: Great Western Dis. Co.
Endorser: W. Arnold, cash'r.
Payer: Terre Haute Dist. Co.
Where payable: Terre Haute.
Date of letter: 16.
Their No.: 66923.
Date of bill: June 14.
Time: 8't.
When due: ——.
Amount: 6,926.15.
Int. or exc.: ——.
Pro. or no pro.: No pro.
When paid: June 20.
Remarks: Credited.

64 Eighteenth. The said Old National Bank on June 18th, 1887, which was on Saturday, transmitted said draft to the said First National Bank, indorsed by the said Old National Bank as follows: "Pay H. S. Deming, cash'r, or order, for collection for acc't of the Old National Bank of Evansville, Ind. Henry Reis, cashier." Said draft was inclosed in a letter, of which the following is a copy:

EVANSVILLE, IND., *June 18th*, 1887.

"H. S. Deming, Esq., cashier, Terre Haute, Ind.:

"I inclose as stated below for coll. & cr.

Very respectfully, HENRY REIS, *Cashier.*"

33,151	T. H. Dist'g Co.	No pro.	$6,926	15	B. L.
33,157	Keys M'f'g Co.	No pro.	17	13	
33,155	Rooney Tr.	No pro.	1	83	
33,154	Reese	No pro.	87		"

The abbreviation "coll. & cr." in said letter stood for the words "collection and credit," and was so understood by the said Old National Bank and the said First National Bank.

Nineteenth. During the month of June, 1887, the said Old National Bank and the said First National Bank were mutually transacting the business of collecting mercantile paper each for the

other and were keeping mutual and reciprocal collection and ledger accounts with each other, said mutual and reciprocal collection business having been transacted and said mutual and reciprocal collection and ledger accounts having been kept continu-
65 ously by said banks since February, 1885, and the debit balances arising as the result of the collection and other business between said banks having been settled periodically since February, 1885, by remittances of money or exchange by the debtor bank to the creditor bank.

Said draft was transmitted by said Old National Bank and received by the said First National Bank as a part of the regular and usual mutual and reciprocal collection business between said banks.

By the uniform practice of the said First National Bank with respect to sight paper, payable in Terre Haute, received by it for collection from the said Old National Bank and which was a part of the regular mutual and reciprocal collection business between said banks, such sight paper was not entered in the collection register of the said First National Bank.

By the uniform practice of the said First National Bank with respect to all other mercantile paper received by it for collection from the said Old National Bank and as a part of the regular and usual mutual and reciprocal collection business between said banks, such paper was entered in a collection register, in which the said Old National Bank was described as the "depositor" of such paper.

By the uniform practice of the said First National Bank with respect to all paper received by it for collection from said Old National Bank as a part of the regular and usual mutual and reciprocal collection business between said banks, a credit to the amount of such paper, upon its payment, if paid to the First National Bank, or upon notification of its payment from the bank to which such paper
66 was transmitted for collection, was entered upon the ledger account of the said First National Bank in favor of the said Old National Bank.

Twentieth. Said draft was received by the said First National Bank on Monday, June 20th, 1887, and was not entered upon its collection register, and was paid to it by the Terre Haute Distilling Company between 2 & 3 o'clock on the afternoon of said day, and on said day, after payment, the amount thereof was credited to the said Old National Bank by the said First National Bank on its ledger account with the said Old National Bank, said credit being in accordance with the uniform practice, as above stated, of said First National Bank with respect to mercantile paper, payable in Terre Haute and paid to it, received by it from collection from said Old National Bank, and which was a part of the regular and usual mutual and reciprocal collection business between said banks.

Twenty-first. On the afternoon of said June 20th, 1887, a letter was written by the said First National Bank to the said Old National Bank, advising the latter of the payment and credit, which letter was posted at or about 4 o'clock of the same afternoon.

Twenty-second. The first mail from Terre Haute to Evansville after the posting of the said letter was scheduled to leave Terre

Haute at 9.30 p. m. of the same day and to arrive at Evansville at 1.30 a. m. of the next day. Said letter was delivered to the said Old National Bank at or about 8 o'clock on the morning of June 21st, 1887.

Twenty-third. During the month of June, 1887, the banking house of the said Fidelity National Bank, the said Old National
67 Bank, and the said First National Bank were from 9 o'clock in the forenoon continuously until three o'clok in the afternoon.

Twenty-fourth. During the month of June, 1887, it was the practice, and for many years prior thereto had been the practice, of the said Old National Bank in entering upon its account books the date of each transaction to enter those transactions as occurring upon the same day which occurred between the beginning of banking hours upon one day and the beginning of banking hours on the next business day. In pursuance of said practice, the said letter having been received by the said Old National Bank as aforesaid prior to the beginning of banking hours on the said 21st day of June, 1887, the amount of said draft was by the said Old National Bank entered upon its account with the said Fidelity National Bank as a credit to the said Fidelity National Bank as of June 20th, 1887.

Twenty-fifth. On said June 21st, 1887, the said Old National Bank wrote and mailed to the said Fidelity National Bank a letter notifying the said Fidelity National Bank of the payment of said draft and the credit to the said Fidelity National Bank upon the books of said Old National Bank, of which letter the following is a copy:

EVANSVILLE, IND., *June 20th*, 1887.

A. Baldwin, Esq., cash'r, Cincinnati, O.:

Your acc't has credited items as below stated.

Very respectfully, HENRY REIS, *Cashier.*"

68	89 33			
	57			
		Yours of 18th inst.		
	8,926 15			
	17 13			
		" " 16	"	
124,595	31 08	" " 11		
123,741	78 28	" " 7		
66,191	22 23	" " 11		
125,059	16 20	" " 14		
65,954	273 92	" " 11		
122,708	3,500 00	" " 28		May.
124,142	441	" " 9		
	74 36	" " 13		
124,303	77 50	" " 10		
	9 36	" " 10		
66,132	12 20	" " 11		
65,104	285 50	" " 7		
66,661	74 00	" " 15		

The Fidelity National Bank began to do a banking business on the — day of ——, 1886, and continued to transact banking business until its failure, as hereinafter stated.

Twenty-sixth. One June 20th, 1887, and for ten days prior thereto the said Fidelity National Bank was insolvent, but neither the said German-American National Bank, the said Old National Bank, nor the said First National Bank had knowledge of this fact, nor did either of said banks have knowledge of such fact until after the failure of the said Fidelity National Bank, as hereinafter stated. On the morning of June 20th, 1887, Mr. Eugene Powell, bank
69 examiner, came to the said Fidelity National Bank for the purpose of making an examination. He did so to a certain extent. In the afternoon of said June 20th, 1887, the board of directors of the said Fidelity National Bank had a meeting at the office of the bank, which continued in session until after the close of banking hours. After the close of banking hours the board of directors adjourned, and immediately thereafter Mr. Powell, as bank examiner, took possession of the said Fidelity National Bank, and that night had the combination of the safe changed, of which combination he took possession. The said Fidelity National Bank kept its doors open for the transaction of banking business until the close of banking hours on June 20th, 1887, and transacted such banking business as offered until that time. The board of directors of the said Fidelity National Bank met early in the morning of June 21st, 1887, and at about 8:30 o'clock, half an hour before the beginning of banking hours, it was announced to the officers of the said Fidelity National Bank that the bank would not open. The said Fidelity National Bank did not open for business on June 21st, 1887, and has never opened for business since June 20th, 1887.

Twenty-seventh. Mr. Eugene Powell, bank examiner, continued in possession of the said Fidelity National Bank, after taking possession of it in the manner aforesaid, until June 27th, 1887, when Mr. David Armstrong was appointed receiver, which position the said Mr. Armstrong held at the beginning of this suit.

Twenty-eighth. On June 22d, 1887, the above-mentioned letter from the said Old National Bank to the said Fidelity National
70 Bank, dated June 20th, 1887, was received by the persons in charge of the said Fidelity National Bank.

Twenty-ninth. No entry other than these above stated was made on the books of the said Fidelity National Bank representing said draft until July 26th, 1887.

On July 23d, 1887, the said Mr. David Armstrong, the receiver of the said Fidelity National Bank, caused to be mailed to the said Old National Bank a postal card, of which the following is a copy :

CINCINNATI, O., *July 23d*, 1887.

Please report on item sent you 6,16 on Distilling Co. for $6,926.15, Terre Haute, Ind.; due sight; 66923. Return this postal in advising.

DAVID ARMSTRONG, *Receiver.*"

To which the Old National Bank replied on the same card:

"Paid and credited your account June 20th.

HENRY REIS, *Cashier*."

Thirtieth. After the receipt of such postal card thus returned the receiver directed the amount of said draft to be credited upon the ledger account of the said Fidelity National Bank with the said German-American National Bank in favor of the said German-American National Bank and to be charged upon the ledger account of the said Fidelity National Bank with the said Old National Bank to the debit of the said Old National Bank, which was done on July 26th, 1887, but under date of June 20th, 1887.

Thirty-first. No remittance of money or any tangible representative of money representing said draft was ever made by the said First National Bank to the said Old National Bank or by the said Old National Bank to the said Fidelity National Bank or by the said Fidelity National Bank or its receiver to the said German-
71 American National Bank, and the proceeds of said draft never passed between said banks, if at all, otherwise than by the debit and credit entries above mentioned.

Thirty-second. Prior to the institution of this suit the said Old National Bank and the said First National Bank made a mutual settlement of their collection accounts up to and including the above-mentioned entries representing said draft. The mutual collection accounts between the said Old National Bank and the said Fidelity National Bank have not been settled on account of the insolvency of the said Fidelity National Bank, but the said Old National Bank claims upon such settlement the benefit of the amount of said draft as a debit on its account with the said Fidelity National Bank.

Thirty-third. On the books of the said Fidelity National Bank, as they stood at the beginning of this suit, the said Fidelity National Bank owed the said German-American National Bank $17,844.77. On the books of the said Fidelity National Bank and the said Old National Bank, as they stood at the beginning of this suit, the said Fidelity National Bank owed the said Old National Bank $14,391.57. The above balances are made by debiting the said Old National Bank with the amount of said draft and crediting the said German-American National Bank with the amount of said draft.

Thirty-fourth. The said German-American National Bank demanded payment of said sum of $6,926.15 from the said Old National Bank prior to the bringing of this action, to wit, on the 29th day of February, 1888.

Thirty-fifth. The words "for collection and credit," as used
72 in the letters between said banks between which such letters passed, signify that the mercantile paper transmitted with such instructions was to form a part of the regular and usual mutual and reciprocal collection business between the banks between which such letters passed.

Thirty-sixth. The following custom of banks exists throughout

the States of Ohio, Indiana, and Illinois and throughout the United States:

Banks may and do agree to act each for the other in making collections of mercantile paper, and, in cases where such arrangements exists between two banks, each bank keeps a book, generally called a collection register, in which a memorandum of all paper received for collection from the other bank is entered. This custom is not observed by some banks doing a small collection business in the case of sight paper payable at the place of the receiving bank, but such failure to observe the custom is for the convenience of the receiving bank. Such memorandum is more or less complete and sometimes contains the name of the person who appears on the face of the paper to be its absolute owner and sometimes does not. Such memorandum always contains the name of the bank from which the paper was received under the heading "depositor" or some word of similar significance.

In case paper received for collection from a bank with which such an arrangement for mutual and reciprocal collection business exists is payable in or near the city or town in which the receiving bank is situated and is paid to the bank receiving the paper, the bank receiving payment, as soon as convenient after the receipt of
73 such payment, credits the amount of such paper to the bank from which such paper was received on its ledger account.

In case paper received for collection from a bank with which such an arrangement for mutual and reciprocal collection business exists is not payable in or near the city or town in which the receiving bank is situated, the bank receiving the paper, after entering the same in its collection register, transmits the same to some other bank more convenient to the place of payment of such paper. Upon receipt of the amount of such paper in money or other currency from the bank to which such bank so transmits said paper as aforesaid, or (in case the bank to which such paper is so transmitted is also transacting a mutual collection business with such transmitting bank) upon notification from such bank to which such paper has been so transmitted of payment of such paper to it and of the credit by it of the amount of such paper on its books to the transmitting bank, the original receiving bank credits the amount of such paper to the bank from which such paper was so received in its ledger account with said bank.

In case the paper is transmitted for collection through two or more banks having such an arrangement for doing mutual collection business consecutively, such transmitting bank, upon notification of payment and credit from the bank to which it transmitted the paper, not only credits the amount of such paper on its ledger account in favor of the bank from which it received the paper, but debits the amount of such paper upon its ledger account against the bank to which it transmitted such paper.

74 When mercantile paper is transmitted for collection by a bank to another bank with which it has an arrangement for doing a mutual and reciprocal collection business, such transmitting bank may, at its option, prior to such transmission, enter the amount

of the paper so transmitted on its ledger account with such other bank as a credit in favor of such other bank; but in such case the entry is provisional, in that it is subject to be charged off by a corresponding debit in case such paper is not paid.

When mercantile paper is transmitted for collection between banks having such an arrangement for doing a mutual and reciprocal collection business, all mercantile paper intended to be collected in pursuance of the custom of bankers and the terms of such arrangement is either indorsed by such transmitting bank "for collection and credit for account of" the transmitting bank, or is endorsed "for collection for account of" the transmitting bank, and is accompanied by a letter of advice stating that such paper is "for collection and credit."

And thereupon the court made and stated the following conclusions of law upon the foregoing statement of facts:

First. That the law of the case is with the plaintiff; to which ruling and conclusion defendant at the time excepted.

Second. That the plaintiff is entitled to recover from the defendant the sum of $6,926.15, with interest thereon, at the rate of 6 per cent. per annum, since the 29th day of February, 1888; to which ruling and conclusion the defendant at the time excepted.

75 And, inasmuch as the above exceptions do not otherwise appear of record in this cause, the defendant prays the court to sign and seal this its bill of exceptions and make the same a part of the record in this cause, which is accordingly done this 12th day of January, 1891.

WM. A. WOODS, [L. S.]
U. S. Dist. Judge.

Which said bill of exceptions is then and there signed by the court and ordered to be made a part of the record herein.

Thereupon the plaintiff orally moves for judgment in its favor upon the foregoing facts, which motion is sustained by the court.

It is therefore here and now considered by the court that the plaintiff, The German-American National Bank of Peoria, Illinois, do have and recover of the defendant, The Old National Bank of Evansville, Indiana, the sum of eight thousand one hundred and seventeen and $\frac{12}{100}$ dollars, together with its costs herein laid out and expended.

76 And afterwards, to wit, at the November term of said court, on the 19th day of January, 1891, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by McDonald, Butler and Snow, its attorneys, and files its appeal bond herein in the sum of eleven thousand dollars, with Samuel Bayard as surety thereon, which bond is approved by the court and is in the words following, to wit:

Know all men by these presents that we, The Old National Bank of Evansville, Indiana, as principal, and Samuel Bayard, as surety, are held and firmly bound unto the above-named German-American

National Bank of Peoria, Illinois, in the sum of eleven thousand dollars, to be paid to said German-American National Bank; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our successors, heirs, executors, and administrators, jointly, by these presents.

Sealed with our seals and dated this 19th day of January, 1891.

Whereas the above-named Old National Bank hath prosecuted its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is that if the above-named Old National Bank shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged or awarded against *him* if *he* shall fail to make good *his* plea,
77 then this obligation to be void; otherwise in full force.

THE OLD NATIONAL BANK OF EVANSVILLE, INDIANA, [SEAL.]
By HENRY REIS, *Cashier.*
SAML BAYARD. [SEAL.]

Sealed and delivered in presence of—

JOHN GILBERT.
GEORGE SCHUELER.

Taken and approved by me this 19th day of January, 1891.

WM. A. WOODS.

78 DISTRICT OF INDIANA:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the proceedings in the cause of The German-American National Bank of Peoria, Illinois, *vs.* The Old National Bank of Evansville, Indiana, No. 8435, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said court this 30th day of January, 1891.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

DISTRICT OF INDIANA:

I, William A. Woods, judge of the district court of the United States for said district, do certify that at the date of the foregoing certificate Noble C. Butler was and now is the clerk of the circuit court of the United States for said district, and that his attestations aforesaid is in due form of law.

Witness my hand this 30th day of January, 1891.

WM. A. WOODS, *Judge.*

79 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the district of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said circuit court, before you, between The German-American National Bank of Peoria, Illinois, and The Old National Bank of Evansville, Indiana, a manifest error hath happened, to the great damage of the said The Old National Bank of Evansville, Ind., as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 19th day of January, A. D. 1891.

Seal Circuit Court of the United States, District of Indiana.

NOBLE C. BUTLER, *Clerk.*

80 UNITED STATES OF AMERICA:

To The German American National Bank of Peoria Illinois, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States for the district of Indiana, wherein The Old National Bank of Evansville, Indiana, — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William A. Woods, judge of the district court of the U. S. for said district & *ex officio* judge of said circuit court, this 19th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

Seal Circuit Court of the United States, District of Indiana.

WM. A. WOODS.

81 Service of the within citation acknowledged this 20th day of January, 1891.

J. A. HOLMAN,
PAXTON & WARRINGTON,
DUNCAN & SMITH,
Att'ys for Defendant in Error.

82 In the Supreme Court of the United States.

THE OLD NATIONAL BANK OF EVANSVILLE, INDIANA, Plaintiff in Error,
vs.
THE GERMAN-AMERICAN NATIONAL BANK OF PEORIA, ILLINOIS, Defendant in Error.

Assignment of Errors.

The plaintiff in error avers that there was and is manifest error in the judgment and proceedings in the above-entitled cause, in this, to wit:

1. The court below erred in its conclusion of law that upon its special finding of facts the law of the case is with the defendant in error.

2. The court below erred in its conclusion of law that upon its special finding of facts the defendant in error was and is entitled to recover from the plaintiff in error the sum of $6,926\frac{15}{100}$, with interest, at the rate of six per cent. per annum, since the 29th of February, 1888.

Wherefore the plaintiff in error prays that the judgment of the court below may be in all things reversed.

JOSEPH E. McDONALD,
JOHN M. BUTLER,
ALPHEUS H. SNOW,
Attorneys for Plaintiff in Error.

Endorsed on cover: Indiana C. C. U. S. No. 1611. The Old National Bank of Evansville, Indiana, plaintiff in error, *vs.* The German-American National Bank of Peoria, Illinois. Filed February 10, 1891.

Office Supreme Court U. S.
FILED.
APR 16 1894
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE OLD NATIONAL BANK OF EVANSVILLE, INDIANA, *Plaintiff in Error,* vs. THE GERMAN-AMERICAN NATIONAL BANK OF PEORIA, ILLINOIS.	No. 381, OCTOBER TERM, 1893.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

ALPHEUS H. SNOW,
Attorney for Plaintiff in Error,
JOHN M. BUTLER,
Of Counsel.

BY ALPHEUS H. SNOW.

FRANK H. SMITH, INDIANAPOLIS.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE OLD NATIONAL BANK OF EVANSVILLE, INDIANA,
Plaintiff in Error,

vs.

THE GERMAN-AMERICAN NATIONAL BANK OF PEORIA, ILLINOIS.

No. 381,
OCTOBER TERM,
1893.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

I. *The occasion and object of the action.* This is an action of trover, or *indebitatus assumpsit* for money had and received, brought by the German-American National Bank, of Peoria, Illinois, as owner of a sight draft for $6,926.15, drawn by the Great Western Distilling Company, of Peoria, Illinois, on the Terre Haute Distilling Company, of Terre Haute, Indiana, to recover damages

to the amount of the draft from the Old National Bank of Evansville, Indiana, for the alleged conversion to its own use and withholding after demand, of the proceeds of said draft, on the ground that the Old National Bank held the proceeds of the draft in its custody as a first subagent for collection, at the time the insolvency of the agent for collection (the Fidelity National Bank, of Cincinnati,) was disclosed; such proceeds having been delivered to the Old National Bank, as alleged, by a second subagent for collection, the First National Bank of Terre Haute, Indiana, to which second subagent the draft was paid by the drawee; and the Old National Bank having refused, as alleged, to pay over the proceeds to the plaintiff, on demand.

The United States Circuit Court, (Hon. William A. Woods, then District Judge,) rendered judgment in favor of the plaintiff, and the defendant sued out its writ of error from this Court.

II. *The pleadings.* The complaint alleges the existence, since June, 1887, and prior thereto, of plaintiff and defendant as National Banking corporations having diverse citizenship; that on June 14, 1887, the plaintiff was the owner of the draft in question; that the plaintiff indorsed the draft "for collection for" itself, and that the draft was transmitted to the Fidelity National "for collection." (Record, p. 1.)

The complaint then alleges that the draft was sent to the Old National Bank and by it to the First National Bank of Terre Haute. (Record, pp. 1, 2.)

The complaint then alleges that "said draft was paid to said last named bank by the Terre Haute Distilling Company, and duly remitted and accounted for to the said defendant, and the defendant ever since said

time has been in possession of the proceeds of said draft, and has not remitted the same to said Fidelity National Bank, or to this defendant." (Record, p. 2.)

The complaint then alleges the failure and insolvency of the Fidelity National Bank, which is charged to have "suspended operation" at the close of banking hours on June 20, 1887; the appointment of David Armstrong as Receiver, on June 27, 1887; the bringing of proceedings for dissolution and forfeiture of the charter of the Fidelity National "on or about the —— day of July, 1887"; and the dissolution of that bank. (Record, p. 2.)

The complaint then alleges that the Old National Bank did not advise the Fidelity National "of collection of said draft and its possession of the proceeds thereof until the 26th day of July, 1887, at which time the said Fidelity National Bank had ceased to do business," and the corporation had been dissolved. (Record, p. 2.)

The complaint then alleges a demand before suit upon the defendant and a refusal of the defendant, and charges that the defendant is therefore indebted to the plaintiff in the amount of the draft, $6,926.15; and asks judgment for that amount. (Record, pp. 2, 3.)

The defendant filed its answer in seven paragraphs. The first paragraph of answer is the general denial. (Record, p. 3.)

The second paragraph of answer sets out all the indorsements between the banks *verbatim*, and alleges that in each case the paper was accompanied with instructions that it was "for collection and credit"; that the paper was paid to the First National Bank of

Terre Haute before the close of banking hours on June 20, 1887, "and the proceeds thereof immediately paid by the First National Bank of Terre Haute to itself"; that prior to the bringing of the suit, mutual settlements had been made between the First National and the Old National, and between the Old National and the Fidelity National. (Record, pp. 3, 4.)

The third paragraph of answer contains the same matter, and in addition, an allegation that a custom of banks, known to plaintiff and defendant, existed on June 14, 1887, and subsequently, for a bank receiving payment of paper indorsed for collection to pay the proceeds directly to itself and to become indebted to the next indorsing bank as of the date when the paper is paid. (Record, pp. 4, 5.)

The fourth paragraph of answer contains the same matter as the third, with the additional averment that there is a custom of banks known to plaintiff and defendant, which existed on June 14, 1887, and subsequently, to pay to each other the proceeds of paper by debiting to each other the amounts of indebtedness so arising, in their mutual collection accounts, the debit or credit being entered as of the date when the paper is paid; and that the Fidelity National, the defendant and the First National Bank of Terre Haute conducted their mutual collection business according to this custom. (Record, pp. 5, 6.)

The fifth paragraph of answer, in addition to the matters alleged in the second paragraph, alleges the existence, *pursuant to agreement*, of reciprocal collection accounts between the plaintiff and the Fidelity National; between the Fidelity National and the defendant; and between the defendant and the First National of Terre

Haute, on June 14, 1887, and subsequently thereto; and that under these mutual agreements, proceeds of paper paid became debit and credit entries in the mutual collection accounts at the date of the payment of the paper; and that the First National of Terre Haute credited the Old National in its collection account, with the amount of the draft, on June 20, 1887.

(Record, pp. 8, 9.)

The sixth paragraph of answer differs from the fifth in alleging that the method of dealing between the banks was both in accordance with banking custom and the agreements of the parties. (Record, pp. 9, 11.)

The seventh paragraph of answer differs from the fifth in that it alleges that in pursuance of the agreement between the banks as to the manner of keeping their reciprocal collection accounts, paper transmitted for collection was entered by each bank as a cash debit and credit upon receipt of the paper for collection, which debit and credit was conditional, in that it was subject to be charged off by a corresponding credit and debit if the paper was not paid. (Record, pp. 12–14.)

The defendant filed a reply of general denial to all the paragraphs of answer except the first.

(Record, pp. 12, 14.)

III. *The trial and subsequent proceedings.* The parties by stipulation waived a trial by jury and submitted the case to the Court for trial, finding and judgment. (Record p. 14.)

The Court, upon request of the defendant, made a special finding of facts and stated its conclusions of law thereon. (Record, pp. 14, 28.)

The facts specially found which plaintiff in error deems material, are as follows:

The draft in question read as follows:

"Great Western Distilling Co., Distillers and Refiners of Spirits.

$6926.15. Peoria, Ills., June 14th, 1887.

At sight pay to the order of Weston Arnold, Cashier, Sixty-nine Hundred Twenty-six 15-100 Dollars.

J. B. GREENHUT,

Sec'y and Treas.

To Terre Haute Distilling Co., Terre Haute, Ind.

No. 4357."

(Record, pp. 16, 30.)

Weston Arnold, on June 14th, 1887, and subsequently, was cashier of the defendant in error. J. B. Greenhut, during the same period, was secretary and treasurer of the Great Western Distilling Company, of Peoria, Illinois. (Record, pp. 16, 30.)

This draft was, by the defendant in error, transmitted, on June 14th, 1887, to the Fidelity National Bank, indorsed "Pay Fidelity National Bank of Cincinnati, O., or order, for collection for German-American National Bank of Peoria, Ills.," and enclosed in a letter which stated that it was sent "*for collection and credit*,"—the defendant in error and the Fidelity National Bank having reciprocal collection accounts *under a contract entered into in September, 1886, by which it was agreed that the banks should keep mutual accounts and that the Fidelity should credit sight items on any part of the United States east of Illinois, where there are banks, at par; and make collections on same points which, when paid, the Fidelity should credit at par.*

(Record, pp. 14, 15, 16, 28, 29.)

The amount of the draft was, before its transmission, debited by the defendant in error against the

Fidelity National Bank in its reciprocal collection account with that bank, the defendant in error intending that such credit should be provisional, *i. e.* subject to be charged off by a counter entry, *in case said draft was not paid.* (Record, pp. 17, 31.)

The draft was, by the Fidelity National Bank, transmitted, on June 16, 1887, to the plaintiff in error, indorsed "Pay Old National Bank, Evansville, Ind., Cashier, or order, for collection. Please report by this number, 66,923. Fidelity National Bank, Cincinnati, O., Ammi Baldwin, Cashier," and inclosed in a letter stating that it was sent "*for collection and credit,*"—the Fidelity National Bank and the plaintiff in error having reciprocal collection accounts, under a contract entered into in July, 1886, whereby the proceeds of collections were to be left with the Fidelity on deposit, and interest at two and one-half per cent. was to be paid to plaintiff in error on daily credit balances of collections.

(Record, pp. 20, 21, 33, 34.)

The draft was, by the plaintiff in error, transmitted, on June 18, 1887, to the First National Bank of Terre Haute, Indiana, indorsed "Pay H. S. Deming, Cash'r, or order, for collection for acc't of the Old National Bank of Evansville, Ind., Henry Reis, Cashier," and inclosed in a letter which stated that it was "*for coll. & cr.*" (the abbreviation "coll. & cr." standing for "collection and credit," by the understanding of both banks),—the plaintiff in error and the First National Banks having reciprocal collection accounts under a contract entered into in February, 1885, whereby the proceeds of collections were left on deposit with the indorsee bank to the credit of the indorser bank, and the credit balance in favor of either bank remitted periodically. (Record, pp. 22, 35.)

June 19, 1887, fell on Sunday, and the First National Bank of Terre Haute received the draft on Monday morning, June 20. (Record, pp. 22, 36.)

On June 20, 1887, between 2 and 3 o'clock P. M., the drawee, the Terre Haute Distilling Company, paid the draft to the First National Bank of Terre Haute, and the First National Bank of Terre Haute immediately credited the amount of the draft on its reciprocal collection account with the plaintiff in error.

(Record, pp. 22, 36.)

The First National Bank of Terre Haute immediately mailed a letter to the plaintiff in error, notifying the plaintiff in error of the payment of the draft, and the credit of the proceeds to the plaintiff in error. This letter was received by the plaintiff in error soon after 8 o'clock A. M., on June 21, 1887, and the amount of the draft was immediately credited to the Fidelity National Bank by the plaintiff in error (the fact of such immediate credit being shown by the fact that the credit was entered as a part of the business of the previous day (June 20), in accordance with the practice of the plaintiff in error with respect to transactions occurring before the beginning of banking hours).

(Record, pp. 23, 36, 37.)

The insolvency of the Fidelity National Bank was disclosed at 9 o'clock on the morning of June 21.

(Record, pp. 25, 38.)

On June 21, 1887, the plaintiff in error mailed a letter to the Fidelity National Bank, notifying it that it had credit with the plaintiff in error for the amount of the draft in question, dating the letter June 20, to signify that the credit was of June 20.

(Record, pp. 23, 24, 37.)

On July 26, 1887, more than a year before this suit was brought, and more than eight months before any demand was made by the defendant in error on the plaintiff in error, the Receiver of the Fidelity National Bank entered the amount of this draft in the collection accounts of the Fidelity National Bank with the two banks concerned, as a debit under date of June 20, 1887, against the plaintiff in error, and as a credit under date of June 20, 1887, in favor of the defendant in error, and as a result of these entries, the Fidelity National was still indebted to the plaintiff in error $14,391.57, while the Fidelity National was indebted to the defendant in error $17,844.77.

(Record, pp. 25, 26, 39.)

The amount of the draft having been debited at the time of its transmission, by the defendant in error against the Fidelity National Bank in its ledger account with the Fidelity, as of June 14, 1887, as above stated, the finding of facts shows that *at the beginning of this suit the books of all the banks concerned showed balances obtained by charging the proceeds of this draft as having come into the hands of the Fidelity National under such circumstances that they were not impressed with any trust, and such as made these proceeds a credit in the account of the Fidelity National in favor of the defendant in error.*

More than a year after the failure of the Fidelity National Bank, however, (on August 20, 1888), the defendant in error brought this suit, after demand made on February 29, 1888. (Record, pp. 1, 26, 39.)

Upon the special finding of facts the Court made the following conclusions of law:

1. That the law of the case is with the plaintiff.
2. That the plaintiff is entitled to recover from

the defendant the said sum of $6,926.15, with interest thereon, at the rate of six per cent. per annum, since the 29th of February, 1888. (Record, pp. 27, 41.)

To each of these conclusions the defendant (plaintiff in error) properly excepted. (Record, pp. 27, 41.)

The decision of the Court below, as understood by counsel for plaintiff in error, proceeded upon the theory that the indorsement "for collection" was plain and unambiguous, and not only created a bailment (agency) relation between the indorser and indorsee, both as to the paper and the proceeds, until the proceeds were received by the indorser, but also gave notice to all subsequent indorsees that the paper and the proceeds were both impressed with the trust; and that evidence of any contract between the indorser and indorsee, or of any custom, to the effect that any relation other than that of true bailor and bailee should exist between indorser and indorsee as to either the paper or its proceeds, was inadmissible.

Consistently with this theory the Court held that the book credit given by the second subagent, (the First National Bank of Terre Haute,) to the first subagent, (the plaintiff in error,) was, in legal effect, a continuation of, or substitute for, the identical proceeds, which was transmissible in the same manner that the promissory note of the subagent which gave the credit would have been transmissible, and that the letter of notification of the credit, was in legal effect, the transmission of the identical proceeds. Upon this theory, it is evident, from the facts specially found, that, in legal effect, the identical proceeds had been transmitted back to the plaintiff in error, and were in its hands with implied notice of the trust, at the time the insolvency

of the Fidelity Bank was disclosed; for, at the instant the insolvency of the Fidelity National Bank was disclosed, (at the opening of banking hours on June 21, 1887,) the plaintiff in error had received the letter notifying it of its credit with its immediate agent, the First National Bank of Terre Haute, and, though it had given a similar credit to the Fidelity on its books, it had not transmitted the credit out of its hands, since it had not mailed to the Fidelity its letter of notification of the credit.

For the purpose of removing all doubts as to the special findings and conclusions of law being a part of the record, plaintiff filed its bill of exceptions, which was duly signed by the Court, setting out the special findings and conclusions of law. (Record, pp. 28, *et seq.*)

The Court rendered judgment for the plaintiff in accordance with its conclusions of law. (Record, p. 41.)

The defendant sued out its writ of error from this Court to the United States Circuit Court, and filed its bond on writ of error. A proper citation was issued, and service thereof acknowledged. (Record, pp. 41, 43, 44.)

ASSIGNMENT OF ERRORS.

The errors assigned by plaintiff in error are as follows:

1. The Court below erred in its conclusion of law that, upon its special finding of facts, the law of the case is with the defendant in error.

2. The Court below erred in its conclusion of law that, upon its special finding of facts, the defendant in error was and is entitled to recover from the plaintiff in error the sum of $6,926.15, with interest, at the rate of six per cent. per annum, since the 29th day of February, 1888. (Record, p. 44.)

Sec. 551, R. S. Indiana, 1881, provides: "Upon trials of questions of fact by the Court, it shall not be necessary for the Court to state its finding, except generally for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the Court upon the questions of law involved in the trial; in which case, the Court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be entered accordingly."

The leading case in Indiana upon the construction of this statute is *Crazan* v. *Smith*, 41 Ind., 288. In that case the Supreme Court of Indiana held that, under this statute, the only way in which a party may present a question for review is to except to the conclusions of law, and to assign as error in the Supreme Court "that the Court erred in its conclusions of law;" and that by so excepting to the conclusions of law, the party "admits that the facts are fully and correctly found, but says that the Court erred in applying the law to the facts found to exist:" and that "when a case is thus prepared for this Court, there is but a single question of law presented for our decision, and that is, whether the Court erred in applying the law to the facts found."

The doctrine of this case was the same that had been adopted, without variation, in all previous cases involving the same question, and the case is a leading one simply because of its full and emphatic statement of the doctrine. It has been followed without variation or qualification in all subsequent cases.

The only question presented for the decision of this Court, therefore, upon the assignment of errors, is: Admitting the facts specially found to be correct, did the Court err in applying the law to these facts?

ARGUMENT.

I.

UPON THE FACTS SPECIALLY FOUND IN THIS CASE, IT WAS THE PLAIN INTENTION OF THE DEFENDANT IN ERROR, AS SHOWN BY THE TERMS OF ITS CONTRACT WITH THE FIDELITY BANK, ITS AGENT, THAT THE AGENCY RELATION OF THE FIDELITY SHOULD DETERMINE AND A DEBTOR AND CREDITOR RELATION ARISE, (THUS DETERMINING THE TRUST AGAINST HOLDERS OF THE PROCEEDS), AT A MUCH EARLIER STAGE IN THE TRANSACTION THAN WAS CONTEMPLATED BY THE CONTRACT BETWEEN THE COMMERCIAL BANK AND THE FIDELITY BANK CONSTRUED IN 148 U. S., 50; YET THE VERY ACT WHICH WAS PERFORMED BY THE SUBAGENTS IN THE COMMERCIAL BANK CASE BEFORE THE INSOLVENCY OF THE FIDELITY WAS DISCLOSED, (THE CREDITING OF THE AMOUNT OF THE PROCEEDS AGAINST AN INDEBTEDNESS OF THE FIDELITY TO THE SUBAGENT, GREATER THAN THE AMOUNT OF THE PROCEEDS), AND WHICH WAS HELD TO DETERMINE THE AGENCY AND TRUST IN THAT CASE, WAS PERFORMED IN THIS CASE BY THE PLAINTIFF IN ERROR, AS SUBAGENT, BEFORE THE INSOLVENCY OF THE FIDELITY WAS DISCLOSED. HENCE, *a fortiori*, THE AGENCY AND TRUST IN THIS CASE WERE, BY SUCH ACTS, DETERMINED BEFORE THE INSOLVENCY OF THE FIDELITY BANK WAS DISCLOSED, AND THE COURT BELOW, IN STATING ITS CONCLUSIONS OF LAW AND IN RENDERING ITS JUDGMENT, BASED UPON THE THEORY THAT THE PLAINTIFF IN ERROR THEN HELD THE PROCEEDS WITH NOTICE OF THE TRUST, ERRED.

In the case of *Commercial National Bank* v. *Armstrong, Receiver*, 148 U. S., 50, the question was whether the Commercial National Bank, as the owner of negotiable paper indorsed for collection to the Fidelity National Bank, should be permitted to recover from Armstrong, as Receiver of the Fidelity National Bank,

the full amount of the paper so indorsed to the Fidelity, and which had been indorsed and transmitted by the Fidelity, for collection, to its correspondent banks. Whether the receiver was so liable depended, of course, upon whether the agency of the bank of which he was receiver had not, or had, determined before the insolvency of the bank was disclosed. Incidentally the decision of this question necessarily involved a decision as to the time when the implied trust determined, for the determination of the agency of course determines all trusts, whether express or implied.

In that case, the contract between the Commercial Bank and the Fidelity was that the Fidelity should "collect at par all points west of Pennsylvania, and remit the 1st, 11th and 21st of each month," and Mr. Justice Jackson (then Circuit Judge) who heard the case in the United States Circuit Court, construed this contract as meaning that "the principal and agency relation created as to the paper continued as to the proceeds thereof," *i. e.*, until the proceeds should be received by the principal:

> *Commercial National Bank* v. *Armstrong, Receiver*, 39 Fed. R. 684, at p. 691.

It appeared that all the subagent banks had paid over the proceeds of collections made by them to the Receiver of the Fidelity except those to which the Fidelity was indebted. Those withheld the proceeds of collections and applied them on the indebtedness, or, in case the indebtedness was less than the proceeds in their hands, remitted the balance to the Receiver.

Mr. Justice Jackson held that, although the relation of principal and agent existed as to the proceeds, yet in an action to charge the receiver as trustee, the owner of

the paper lost its right to trace the proceeds into the hands of the receiver when the amount of the proceeds was credited by the subagent bank against an indebtedness of the Fidelity to it greater than the amount of the proceeds, provided such credit was given before the insolvency of the Fidelity was disclosed.

Commercial National Bank v. Armstrong, Receiver, 39 Fed. R., 684.

This Court, speaking by Mr. Justice Brewer, in affirming the judgment of the Court below in that case, (148 U. S., 50, 58,) said: "The conclusions of the Circuit Court were based upon the idea that these collections could not be traced, because they had passed into the general fund of the bank. We think, however, that a more satisfactory reason is found in the fact that, by the terms of the arrangement between the plaintiff and the Fidelity, the relation of debtor and creditor was created when the collections were fully made;" and, "as to those moneys collected by subagents to whom the Fidelity was in debt, and which collections had been credited by the subagents upon the debts of the Fidelity to them, before its insolvency was disclosed," the receiver was properly held not to be chargeable as trustee "for there the moneys had practically passed into the hands of the Fidelity, the collection had been fully completed."

In the Commercial National Bank case, the Commercial National Bank *intended*, upon the construction given to its contract with the Fidelity by this Court; that the relation of principal and agent should continue to the very last instant consistent with the relation of debtor ever being assumed by the agent. Certainly such an intention could not be more emphatically ex-

pressed than by entering into a contract which provided that the agent bank should "collect at par all points west of Pennsylvania and remit the 1st, 11th and 21st of each month," which was the contract in question in the Commercial Bank case.

In this case, the *intention* of the owner of the paper was that, in the case of "sight items" like that under consideration in this case, there should be no agency whatever, and that, in the case of time paper, there should be no agency as to the proceeds, its object being to obtain, at the earliest possible instant, a credit balance with the agent against which it could draw, and on which it might receive interest at the rate of two and one-half per cent. The contract is contained in three letters which passed between the German-American National Bank and the Fidelity Bank, in September, 1886, the substance of which is as follows:

The Fidelity National Bank agreed to "credit sight items on any point in the United States east of Illinois, where there are banks, at par; *and make collections on same points, which, when paid, will credit at par*"; also to credit all checks of the German-American National Bank upon the principal cities at par, "allowing two and one-half per cent. on daily balances, calculated when monthly statements are rendered"; and to honor checks drawn by the German-American against balances in the hands of the Fidelity, or, upon request of the German-American, to remit, without charge, up to the amount of its credit balance, to New York, for the credit of the German-American; or, upon request of the German-American, to ship to it currency, up to the amount of its credit balance, express charges at the cost of the German-American; and the German-American

agreed, in consideration of the Fidelity's agreement, to credit at par, in the mutual collection account, all Peoria collections sent to it by the Fidelity.

(Record, pp. 15, 16, 28, 29.)

It would seem to need no argument to prove that, if a certain act performed by a subagent (the immediate agent of the agent), determines an agency when the principal and the agent have agreed, as between themselves, that the agency shall continue to the last instant consistent with a debtor and creditor relation ever arising between the original contracting parties, the same act, performed by a subagent (the immediate agent of the agent) must determine the agency, or post-date the determination of the agency, when the principal and agent have agreed, as between themselves, that the agency shall continue only until the first possible instant when a debtor and creditor relation could arise between them.

It simply remains, therefore, to be ascertained that the record shows the existence, in this case, of three facts:

1. That the defendant in the Court below (plaintiff in error), was the immediate agent of the insolvent agent (the Fidelity).

2. That the defendant below (plaintiff in error), credited the amount of the draft in question to the Fidelity before the insolvency of the Fidelity was disclosed.

3. That, at the moment when such credit was given, the Fidelity was indebted to the defendant below (plaintiff in error), to an amount equal to or greater than the amount of the draft in question.

These facts are, by the special finding of facts, found to exist in this case:

1. The Court below found that the draft in question was indorsed by the Fidelity National Bank to the plaintiff in error "for collection" and was forwarded to the plaintiff in error, on June 16, 1887, in a letter stating that it was inclosed "for collection and credit."

(Record, pp. 19, 32, 33.)

2. The Court below found that the draft in question was credited by the plaintiff in error to the Fidelity before the opening of banking hours on June 21, 1887.

(Record, pp. 23, 37.)

The Court below also found that the banking hours of the plaintiff in error and of the Fidelity began at the same hour in the morning,—nine o'clock.

(Record, pp. 23, 37.)

The Court below also found that the Fidelity National Bank first failed to open for business on June 21, 1887. (Record, pp. 25, 38.)

3. The Court found that, even after the plaintiff in error had credited the amount of the draft on its account with the Fidelity, the Fidelity was indebted to the plaintiff in error in the sum of $14,391.57; that is, that at the time the plaintiff in error gave the credit to the Fidelity, the Fidelity owed it $21,317.72.

(Record, pp. 26, 39.)

For the reasons above stated, the agency of the Fidelity had determined before its insolvency was disclosed, and the Court below, in its conclusions of law and judgment, based upon the theory that such agency and the implied trust against plaintiff in error, as subagent, was not then determined but still continued at the time of bringing the suit, erred.

II.

UPON THE FACTS SPECIALLY FOUND IN THIS CASE, THE TRUST AS TO THE PROCEEDS OF THE DRAFT WAS DETERMINED PREVIOUS TO THE TIME WHEN PLAINTIFF IN ERROR CREDITED THE AMOUNT OF THE PROCEEDS OF THE DRAFT ON AN INDEBTEDNESS OF THE FIDELITY NATIONAL TO IT GREATER THAN THE AMOUNT OF THE DRAFT, TO WIT: AT THE INSTANT WHEN, IN ACCORDANCE WITH THE PRIVATE CONTRACT BETWEEN DEFENDANT IN ERROR, AS OWNER OF THE PAPER, AND ITS IMMEDIATE INDORSEE "FOR COLLECTION," THE FIDELITY BANK, AND IN ACCORDANCE WITH THE CUSTOM OF BANKERS, BY WHICH CUSTOM THAT CONTRACT IS TO BE EXPLAINED, THE AGENCY BETWEEN THE FIDELITY BANK AND THE DEFENDANT IN ERROR WAS DETERMINED, WHICH WAS THE INSTANT AFTER THE DRAFT WAS PAID TO THE FIRST NATIONAL BANK OF TERRE HAUTE, THE THIRD INDORSEE, WHICH RECEIVED PAYMENT OF THE DRAFT; THE INSOLVENCY OF THE FIDELITY NOT HAVING BEEN DISCLOSED UNTIL THE NEXT DAY AFTER THE DRAFT WAS SO PAID. IF SO, THE COURT BELOW, IN STATING ITS CONCLUSIONS OF LAW AND RENDERING ITS JUDGMENT, BASED ON THE THEORY THAT THE TRUST AS TO THE PROCEEDS WAS NOT DETERMINED AT THE TIME THE INSOLVENCY OF THE FIDELITY BANK WAS DISCLOSED BUT CONTINUED DOWN TO THE BEGINNING OF THIS SUIT, ERRED.

In the establishment of this proposition it will be necessary to establish four propositions, the first of which is as follows:

1. *The words "for collection," in an indorsement of negotiable paper, are plain and unambiguous in this: that they signify that the relation of bailor and bailee shall exist both as to the note and its proceeds; but are ambiguous in that they do not signify what kind of a bailment shall exist as to the proceeds, whether a true bailment (a bailment*

for hire, for custody, exchange and return, under which the identical thing received in exchange must be returned to the bailor) or a quasi and irregular bailment of the kind called in the civil law "mutuum," whereby, according to Story, "the specific thing" received in exchange "is not to be returned, but a thing of similar nature and value;" (which, though having the characteristics of a bailment, yet, according to Story, has also the characteristics "of a sale or barter and is governed by the same rules," and gives rise, when completed, to a transfer of the ownership of the property covered by the contract and the substitution of an indebtedness therefor); and, in order to explain this ambiguity as to the kind of bailment intended, the Court may receive evidence of an express contract between the parties or of a general custom in accordance with which the parties must be held to have contracted.

This Court having recently adopted the word "agency" to define the relation created between indorser and indorsee "for collection," (in *Commercial National Bank* v. *Armstrong, Receiver*, 148 U. S., 50), it is proper for counsel to explain their reason for adopting a different definition. The reason is, that, after careful reflection, counsel for plaintiff in error have thought it necessary, for the full elucidation of their argument, to adopt the word "bailment" as describing the transaction of indorsement "for collection," believing that the transaction of indorsement "for collection" is not necessarily completed when the *agency* is determined, since there may yet remain a *debt* where originally there was a *trust*, which debt rests upon the same foundation as did the trust, *i. e.*, on the indorsement "for collection," and that to prove a contract or custom that the transaction of indorsement "for collec-

tion" shall result in a debt, after having had its inception as a trust, is to prove a contract or custom *in contradiction* of the indorsement "for collection" if those words be held necessarily to establish only the relation of agency, which is wholly a *trust* relation. By using the expression "bailment" a word is obtained which is broad enough to cover a transaction wholly of trust, or one of trust resulting in a debt, and there is no contradiction of the indorsement when proof is made of a contract or custom that the transaction of indorsement "for collection" shall begin as a trust and result in a debt.

That the word "bailment" is a word having this width of meaning is well settled. Story in his work on Bailments, Secs. 47, 228, 283, 284, 370, 439, treats a transaction whereby it is agreed that a trust shall by the act of the trustee ripen into a debt, as a bailment, and describes it by its name in the civil law, "*mutuum*."

Story also says in his work on Bailments, Sec. 423: "In the common law, such agencies and labor and services only are included under the head of bailments, as are employed about personal property intrusted by the owner to the bailee."

In the sections above cited from Story on Bailments, on the subject of *Mutuum*, it is plainly shown that "bailment" is a more inclusive term than "agency," and that the aspect of bailment may exist where there never was an agency, or, at least, where there was never more than an *instantaneous* agency, existing for the instant of time between the moment of delivery of the property by the owner and the moment of destruction of the identity of the property by the other contracting party by mingling it inextricably with other property

of the same kind owned by him, (as, for example, when grain is delivered to an elevator company, upon a contract that it shall be returned in kind); or in a case where an agency once existed which has been determined, (as, for example, when grain is delivered to a miller to be kept in bags until ground, and after grinding, the meal to be mixed with the miller's meal, and an equal value of meal returned.)

It is true that Story states that the transaction which the civil law described as "*mutuum*," has the aspect of a transaction of sale or barter, as well as of a transaction of bailment. In note 2 to Sec. 284, of his work on Bailments, he says, in explanation of the very limited consideration which he gives to this kind of transaction: "Pothier has devoted an entire treatise to the law arising out of the contract of *mutuum*. It does not seem to me that in our law it requires any such distinct examination, as it falls under the general head of sale or barter, and is governed by the same general rules."

Yet in his work on Bailments, Story everywhere treats the transaction of *mutuum* as a bailment. In note 2 to Sec. 370, he says: "Mr. Gibbon, in common with many other writers, has complained of the poverty of our language in regard to *terms expressive of some of the different classes of bailments*, and especially of the difference between a *mutuum* and a *commodatum*."

So, in Sec. 370, he says:

"There is another classification made by Pothier and alluded to by Sir William Jones, in contracts of hire, and in which the former divides them into regular contracts of hire, and irregular contracts of hire. In the former case the specific thing which is let to hire is

to be returned; in the latter case, the specific thing is not to be returned, but a thing of a similar nature and value. In this view the regular hiring corresponds to a regular deposit, and the irregular hiring to a *mutuum;* and the same distinction subsists between them. In the regular contract of hire, the proprietary interest in the thing let is not changed, but remains in the letter; in the irregular contract of hire, the proprietary interest in the thing is changed and passes to the hirer. The same distinction was recognized in the Roman law. * * * This distinction is not formally acknowledged in the common law; *although it may exist in practice, and give rise to different rights and responsibilities in the hirer.*"

The case now under discussion, and the case of *Commercial Bank* v. *Armstrong, Receiver*, recently decided by this Court, are, as counsel for plaintiff in error believe, cases of the very kind to which Mr. Justice Story was referring in the language last above quoted.

In order to avoid the use of the Latin word *mutuum*, counsel for plaintiff in error have used the idea of Pothier, shortening his expression "irregular contract of hire" into the expression "*quasi*-bailment," for convenience.

It is hoped, therefore, that the change of definition of the transaction of indorsement for collection from that of "agency" to that of "bailment," will be considered by the Court as justifiable.

Assuming the Court to be convinced that the change of definition is justifiable, the following considerations are presented in support of the first proposition:

Nothing is better settled in this Court than that, while "neither parol proof nor custom can be received to *contradict*" the *plain and unambiguous language* of an

indorsement of negotiable paper; nevertheless, either parol proof or custom will be received to *explain* the indorsement, *when the language of the indorsement is ambiguous.*

White v. *National Bank*, 102 U. S., 658, 661.

Falk v. *Moebs*, 127 U. S., 597.

In the case of *Falk* v. *Moebs*, 127 U. S., 597, 601, 607, this Court, speaking by Mr. Justice Lamar, in a case involving the question whether a note payable to and indorsed by a man, as secretary and treasurer, was a personal or a corporate note and indorsement, said: "Does the indorsement on the notes involved in this case, *in terms*, purport to be that of the Peninsular Cigar Company, or does it purport to be the personal indorsement of Moebs? In other words, can it be clearly ascertained from these instruments themselves who is, in law, the indorser of them? Is the indorsement plain and clear or is it ambiguous?" The conclusion of the Court was: "There is no ambiguity in the indorsement. * * * This being true, it follows that the Court below was right in excluding from the jury the evidence offered to explain away and modify the terms of such indorsement."

But it may be said that this Court has in the case of *White* v. *National Bank*, 102 U. S., 658, 660, 661, uttered a careful *dictum* to the effect that there is no ambiguity in the words "for account" in an indorsement of negotiable paper, and that the same reasoning applies to an indorsement "for collection." It becomes necessary therefore to carefully examine the language and application of that case.

In that case, this Court, speaking by Mr. Justice Miller, said (expressly as a *dictum*), in a case *in which an*

indorsee "for account" of the indorser was seeking in an action on the indorsement, the paper being unpaid, to show, by parol, that the indorsement was absolute and did not create a bailment, and in which it could only have been material for the Court to determine whether the indorsement did or did not create a bailment *of the paper*, had the case been decided on this ground: "The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage,"—thus plainly implying that, if the language of the indorsement were ambiguous, parol proof or usage would be admissible to *explain* it. In the statement of Mr. Justice Miller, *as applied to the case he was considering*, counsel for plaintiff in error agree fully. There was no ambiguity in the language of the indorsement, as applied to that case, because the transaction had not reached the stage where the paper had ceased to exist, and where the question was, what was to be done with the proceeds.

Mr. Justice Miller continues: "The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is *to receive it* on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money *when received*. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser." With this statement counsel for plaintiff in error also fully agree, if it be read literally. The indorsee "for collection" or "for account" doubtless always does *receive* the money paid as a true bailee, and must always hold the identical moneys received, in contemplation of law, for at least an instant (and much longer, if the parties so agree), as

the property of the indorser. The words "when received" are to be interpreted, therefore, as "at the moment of receipt of money in payment of the paper." To this extent the words "for account" or "for collection" are clear and unambiguous. As the owner of the paper under such restricted indorsement, however, has full ownership of the proceeds, at the instant they exist as such, it is quite evident that a contract or custom may be shown whereby he agreed to transfer the ownership of them to the indorsee, without contradicting his indorsement "for collection" *provided a bailment relationship is by the contract or custom, to arise between him and his indorsee, upon such transfer of ownership.*

In other words, it is wholly consistent with the case of *White* v. *National Bank*, for this Court to hold that an indorsement "for collection" is not contradicted in a suit involving the rights of the parties to the *proceeds* of the paper by proof of an agreement or custom that a bailment of some kind, whether regular or irregular, exists as to the proceeds, since that case merely contains an indisputably true *dictum* that an indorsement "for collection" is contradicted by proof of an agreement or custom to the effect that *no bailment whatever*, either regular or irregular, shall exist either as to the paper or the proceeds, but that the paper and the proceeds shall be the absolute property of the indorsee, without liability to pay or account therefor.

The ambiguity as to the kind of bailment intended by the indorsement "for collection" arises from the fact of an established custom of business whereby such indorsements are more frequently made to banks or bankers, who habitually and by an established custom of business, do business as *quasi*-bailees of the moneys

of their customers subject to the obligation to return, or demand, an equal value of money, than to any other persons or corporations; such indorsements to banks or bankers being for the mutual interest of both parties so long as the indorsee bank or banker is habitually paying all claims on demand, since the owner thus avoids the risk of loss in transmission, thereby saving the price of insurance and transportation, and the bank or banker obtains the right to make interest on the money by loaning it out.

In the case of *Commercial Bank* v. *Armstrong, Receiver*, this ambiguity was recognized by this Court, and by the Court below, and the contract and custom explaining the ambiguity fully and carefully considered.

Under what other possible hypothesis could the Court, (as it did), have considered the terms of the agreement between the Commercial Bank and its indorsee "for collection," the Fidelity, and the custom of bankers, and have come to the conclusion that under such custom, read into the agreement of the parties, it was agreed between them that the relation of true bailor and true bailee (principal and agent) should exist as to paper, and also as to the proceeds up to to the time when they should be received by the Fidelity, and that then the relation should be changed to that of creditor and debtor, in accordance with which agreement, the Fidelity had the option (and doubtless the *obligation*) to instantly determine the relation of principal and agent by its own act of inextricably mingling the proceeds with its own money and evidencing such mingling by an entry on its own books, showing credit for the amount of the paper in favor of the Commercial Bank; and thus to rightfully evolve,

by its own act, out of its original trust, a debt against itself?

And under what other possible hypothesis could the Court below, (as it did), have considered the terms of the agreement between the Commercial Bank and its indorsee "for collection," the Fidelity, and the custom of bankers, and have come to the conclusion that, by the agreement, the custom of bankers was controlled, and the relation of true bailor and true bailee, both as to the paper and its proceeds, continued between the Commercial Bank and the Fidelity until the proceeds were actually received by the Commercial Bank?

If the words "for collection" were without ambiguity as to the proceeds, and plainly and of necessity created a true bailment as to the proceeds, until received by the Commercial Bank, all such proof was plainly inadmissible, and the decision must necessarily have been exactly contrary to that rendered, for then the indorsee banks would have had actual notice of the trust by the indorsement "for collection," and in retaining the proceeds to apply on an indebtedness of the preceding true bailee, would have been plain wrongdoers with notice of their wrongdoing, instead of *bona fide* purchasers of the proceeds for value, or entitled to retain the benefit of the credit against the owner of the paper on the ground of estoppel.

In a suit against the receiver of the insolvent agent, the recovery might be denied even admitting the indorsement to be unambiguous and the indorsees to be wrongdoers, on the ground of inability to trace the proceeds into his hands, yet even this seems rather inequitable if it be admitted that the receiver has an undoubted right of action and a preferential claim

against the solvent indorsee, for the amount claimed from the receiver by the owner. However, this inquiry is immaterial, for this Court expressly refused to base its decision in the suit against the receiver, on the inability of the owner of the paper to trace the proceeds, and placed it on the ground that by the retention of the proceeds by the indorsee to apply on the insolvent agent's indebtedness to it, "the moneys had practically passed into the hands of" (the agent), "the collection had been fully completed,"—thus treating the indorsee as having acted rightfully, which could only be the case if the indorsement is ambiguous as to the kind of relation to the proceeds intended.

This ambiguity as to the kind of bailment intended by the indorsement "for collection," when the indorsee is a bank or banker, has also been recognized by this Court in the following cases:

Marine Bank v. *Fulton Bank*, 2 Wall., 252.
Thompson v. *Riggs*, 5 Wall., 663.
Planters Bank v. *Union Bank*, 16 Wall., 483.
Seamans v. *Kimball, Assignee*, 92 U. S., 362.
Phœnix Bank v. *Risley*, 111 U. S., 125.

In the case of *Planters' Bank* v. *Union Bank*, 16 Wall, 483, this Court, speaking by Mr. Justice Strong, (at p. 501), said:

"A collecting bank ordinarily becomes the owner of money collected by it for its correspondent, and consequently a debtor for the amount collected, under obligation to to pay on demand, not the identical money received, but a sum equal in legal value.

"It is to be observed that this is the rule where has been deposited *or collected, and where there has been no contract or understanding that a different rule should prevail.*"

Before passing to the next proposition, it may be well to notice some objections which may be made to the proposition above advanced, that the words "for collection" in an indorsement are ambiguous as to the kind of relation intended as to the proceeds, so that parol proof or custom may be received to explain the ambiguity.

The first objection is that, even admitting this to be the case, only such parol proof or custom can be shown as is consistent with a general property in the thing bailed, or in its agreed substitute, existing in the indorser, and a special property existing in the indorsee, during the existence of the transaction, and the following words of this Court in a very recent case, (*Sturm v. Baker*, 150 U. S., 312, 329), will doubtless be quoted in support of this objection:

"The recognized distinction between bailment and sale is that where the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale."

Certainly in nothing said above have counsel for plaintiff in error attempted to deny the truth of this statement of the Court. Counsel for plaintiff in error do not claim that the transaction whereby the receiver of the property is "at liberty to return another thing" *of the same kind and value*, is not a sale, but only that it has *the aspect* of a bailment. The language of this Court, above quoted, was *with reference to the rights*

of the parties under such a contract. Those rights are doubtless the rights of vendor and vendee. Yet, undeniably, by the understanding of Mr. Justice Story and the writers on the Roman and civil law, the transaction whereby "the receiver is at liberty to return another thing" *of the same kind and value*, has the aspect of a bailment, as well as that of a sale, and the contention of counsel for plaintiff in error is that the law will regard this aspect, when to do so will be to most nearly conform to the intention of the parties, and that conformity to the intention of the parties requires the classification of the transaction as a bailment, when the question is *whether or not a contract, providing that this transaction shall take place, shall be proved to explain words which naturally, and by their ordinary meaning, create an agency or true bailment.* There is no conflict whatever, therefore, between the proposition of this Court and the proposition of counsel for plaintiff in error. The two propositions are simply views of a transaction having two aspects, taken from opposite points of view. For most purposes the transaction is classified as a sale, as this classification most nearly conforms to the intention of the parties; for other purposes, it is, as counsel for plaintiff in error submit, to be classified, (and, as they submit, by this Court has been classified), as a bailment, because to so classify it most nearly conforms to the intention of the parties.

A second objection is that, inasmuch as it must be admitted that the transaction whereby the owner of property parts with it in return for an obligation of the other party to return to him property of the same kind, and of the same amount or value, is, as Story says, a transaction of sale or barter in one aspect, as

well as a transaction of bailment, one party to the transaction has no better right to say that he shall have the right to prove a contract or custom creating such relationship under an indorsement "for collection" because the transaction is a bailment, than the other party has to say that he shall not, because the transaction is one of sale or barter.

This objection it might be difficult to meet on strict principle. The determination of it might well rest on grounds of expediency. However, this Court has settled this objection by its decisions. In the case of *Marine Bank* v. *Fulton Bank*, 2 Wall., 252, this Court, speaking by Mr. Justice Miller, sustained an instruction to the jury which was based on the theory that a contract, whereby a banker agreed with the owner of paper, to receive "for collection" certain negotiable paper, might be explained by proof of a contract that the proceeds were "for credit" and by the custom of bankers that moneys received by them should be borrowed by them under an obligation to return a like value in kind as a debt, in view of which custom the parties contracted. This was plainly an admission that proof of the relation of *quasi*-bailor and *quasi*-bailee as to the proceeds, denominated in the civil law "*mutuum*," was not inconsistent with, but explanatory of, the words "for collection;" which could only be the case if the Court recognized a "*mutuum*" as a bailment. This Court considered evidence of the same kind in explanation of an indorsement "for collection," as above pointed out, in the case of *Commercial National Bank* v. *Armstrong, Receiver*, 148 U. S., 50.

The objection that to use the word "bailment," as describing the character of an indorsement "for collec-

tion," is an unwarranted and unnecessary change of definition has been answered above. However, if the ambiguity in the indorsement "for collection" be admitted, it is immaterial for the purposes of this argument whether the ambiguity be considered as an ambiguity as to the time when the agency is to determine and a transaction of sale or barter giving rise to an indebtedness, is to take place, or an ambiguity as to the kind of bailment intended. It is only necessary that this transaction of sale or barter, giving rise to an indebtedness, should be called a bailment when it is sought to sufficiently explain on what principle proof of such a transaction can ever be admitted under an indorsement "for collection."

In what has been said above, it has been attempted to be shown that the use of the word "bailment" is necessary to fully explain why proof of a contract between an indorser "for collection" and his indorsee, or a custom, to the effect that the relation of creditor and debtor shall exist between them as a result of the indorsement "for collection," is admissible in a suit *involving only the rights of the indorser "for collection" and his indorsee, as between themselves.* When the suit involves the rights of the original indorser "for collection" as against a second or subsequent indorsee, additional reasons exist for defining the transaction as a bailment in order to carry out the intentions of the parties and to explain the decisions, as will hereafter be attempted to be shown.

Assuming that assent has now been gained to the first proposition, the second proposition is as follows:

2. *The indorser "for collection" has it in his power to remove all ambiguity as to the kind of bailment intended to*

he created as to the proceeds, so as to give notice to all the world of his intention to retain the relation of true bailor as to the proceeds, by indorsing the paper not only with the words "for collection," but with additional words signifying his intention to remain a true bailor as to the proceeds.

It would seem that this proposition needed no argument. In every day's business, negotiable paper is indorsed "for collection and remittance to." It might properly be indorsed "for collection and shipment of proceeds to," if the owner desired to put it beyond all doubt that he intended to remain a true bailor as to the proceeds. Such an indorsement would be very proper and necessary, for instance, if the paper were payable in gold and the owner desired to obtain gold.

That such an indorsement would give notice of the intention of the owner to all the world, and would create a property right, in his favor, against every subsequent indorsee, is settled.

Any restrictive indorsement is notice of the owner's right of property to all the world, in so far as it is unambiguous.

(*1 Daniel on Negotiable Instruments*, Secs. 698, 698a.)

It is to be noticed that this power in the owner of the paper to give notice, by words of indorsement, of his intention to remain a true bailor as to the proceeds, necessarily implies the power to give notice of an intention to remain such true bailor as to the proceeds, absolutely and until the identical proceeds reach his hands, or under any qualification which he may see fit to make and to state unambiguously in his indorsement, short of denying any bailment relation. For example, he has the power to signify his intention to

remain a true bailor as to the proceeds until they reach the hands of his immediate indorsee, and then become a creditor. Apt words to express this intention would be, "for collection, for remittance (or shipment of proceeds) to (name of the immediate indorsee) and for credit."

So also the power in the owner of the paper to give notice, by words of indorsement, of his intention to remain a true bailor as to the proceeds implies the power to disclaim any such intention entirely, and to give notice of his intention to assume the relation of creditor as to his indorsee and determine the express and implied trusts the instant the proceeds exist as such, *i. e.*, at the instant after the paper is paid. This the owner of paper would do, it is submitted, by indorsing the paper "for collection and credit."

Assuming the second proposition to be granted, the third proposition is as follows:

3. *Inasmuch as the owner of negotiable paper has it in his power to give notice to all the world of his intention to remain a true bailor as to the proceeds until they are actually received by him, or until such stage in the transaction as he may choose, by indorsing the paper with apt words to signify this intention, in addition to the words "for collection;"*

And inasmuch as the relation of creditor and debtor is,—in cases where the persons or corporations, into whose hands the paper will naturally come in process of collection habitually deal as quasi-bailees and are solvent,—equally as safe for the indorser as would be the relation of true bailor and true bailee, and less expensive for him;

And inasmuch as the relation of creditor and debtor is not only not a burden but of positive benefit to the indorsee,

since the indorsee obtains the right to make interest on the money by loaning it at interest, whereas the relation of true bailor and true bailee imposes a heavy obligation and risk on the indorsee;

The Court, whether the action be, in form, at law, or in equity, (while, in a suit involving only the rights of the indorser against the indorsee, it will give effect to a private contract between them, that the indorser shall remain a true bailor as to the proceeds, until receipt of the proceeds or until some specified previous stage in the transaction, even though the indorsee habitually does business as quasi-bailee), will, in a controversy involving the rights of the indorser "for collection" against a second or subsequent indorsee, treat the indorser "for collection" as having failed in his duty, as negligent, and as without superior equity, who, knowing that, in the ordinary process of collection, the paper will come into the hands of indorsees habitually doing business as quasi-bailees, fails to indorse the paper with apt words in addition to the words "for collection" to show his intention to remain a true bailor as to the proceeds until the agreed stage in the transaction, and seeks to recover the amount of the proceeds against such second indorsee, as a true bailee, upon the insolvency of the first indorsee occurring before the happening of the agreed event, as against a showing, by such second or subsequent indorsee, that, while all the parties to the transaction were solvent, it advanced money or gave extension of credit to the insolvent first indorsee, on the faith that it might properly deal with the proceeds as a quasi-bailee; and will deny the plaintiff any right of recovery, on the ground that where one of two innocent parties must suffer, that party must suffer which, by its act, has induced the other's action.

The equity of this proposition is so manifest that

argument on principle in support of it seems unnecessary; especially in view of the fact that if this proposition is correct, it furnishes a complete reason for the very righteous decision of this Court in the case of *Commercial Bank* v. *Armstrong, Receiver*, 148 U. S., 50, before referred to, and is, as counsel for plaintiff in error judge, the identical reason which this Court had in mind in making that decision, but which it did not deem it expedient to fully state at that time.

In the Commercial Bank case, all the facts existed which were necessary to the application of the doctrine set forth in the above proposition. These facts were as follows:

1. The Commercial Bank made a private contract with its indorsee "for collection" that it should occupy the relation of true bailor as to the proceeds until they were actually received by the indorsee, at which time its relation was to change to that of creditor.

2. The Commercial Bank failed to give notice of this relation to all the world, as it ought to have done, by indorsement of the paper with apt words to signify this intention.

3. Though the first indorsee failed before the agreed event, which was to create the Commercial Bank a creditor, had occurred, so that if full effect had been given to the contract, the Commercial Bank could have claimed as a true bailor and could have followed the proceeds into the hands of the receiver of the indorsee or into the hands of subsequent indorsees; yet inasmuch as:

4. The indorsement "for collection" was to a bank, an institution which habitually does business as *quasi*-bailee and collects negotiable paper through other

banks, of which custom of business the Commercial Bank had full knowledge; and inasmuch as:

5. The second indorsee had extended credit to the first indorsee on the faith that it had the right to treat itself as a *quasi*-bailee of the proceeds; and inasmuch as:

6. The second indorsee had actually received the proceeds before the insolvency of the agent was disclosed, and had elected to apply them on an indebtedness of the agent to it greater than the amount of the proceeds, as it might rightfully have done if it had been a *quasi*-bailee as to the proceeds; and inasmuch as:

7. The suit, though in form against the receiver of the first indorsee, really involved the rights of the second indorsee, since if a recovery had been permitted against the receiver, he would have had an undoubted right of action and a preferential claim against the second indorsee;—this Court rightfully considered that the Commercial Bank was without superior equity when it claimed against the rights of the second indorsee, (the real party defendant in interest), but, on the contrary, was, as against the second indorsee, to be treated as having been negligent in the assertion of its rights to ownership of the proceeds; so that, as one or the other must suffer, it must suffer, because, by its negligence, it had induced the extension of credit to be given by the second indorsee to the insolvent first indorsee.

Under this explanation, the case of *Commercial Bank* v. *Armstrong, Receiver*, is but an application of the doctrine of this Court declared in the cases of *Bank of Metropolis* v. *New England Bank*, 1 How., 234, and *Wilson* v. *Smith*, 3 How., 763. In those cases, the question was whether an unrestricted indorsement was

ambiguous, so that a private contract between indorser and indorsee could be shown as against the rights of a second indorsee who had received *the paper* from the first indorsee and extended credit to him on the faith that the indorsement was absolute and that it might rightfully hold *the paper* as collateral security for credit extended to the first indorsee; and this Court very properly held that, though such indorsement was ambiguous and might have been explained, as between the owner and his indorsee, by their private contract that the indorsee should hold the paper for collection, yet that, inasmuch as the owner had it in his power to give notice to all the world that the paper was for collection, by an indorsement to this effect, the owner was without superior equity when he claimed that effect should be given to the private contract between himself and the first indorsee, as against the rights of a second indorsee claiming to hold *the paper* as collateral security for extensions of credit given by it to the first indorsee.

The ground of the decisions last above cited, is plainly that of estoppel. Had it appeared that the second indorsee claimed as a *purchaser* of the paper instead of a *pledgee*, the ground of decision would, of course, have been that he was a *bona fide* purchaser of the paper.

In the case of *Commercial Bank* v. *Armstrong, Receiver*, the ground of decision seems to be more properly defined as that of purchase for value than of estoppel, though doubtless either definition would be accurate.

Inasmuch as the transaction of *quasi*-bailment is, as Story says, in one aspect a transaction of sale or barter (of sale, when the property to be returned in

kind is money, and of barter when the property to be returned in kind is goods,—the money being treated as a *package of money*, until its identity is lost by intermingling and the obligation to return the same amount in kind arises; Cf. *Marine Bank* v. *Fulton Bank*, 2 Wall., 252),—the second indorsee, in rightfully applying the moneys which constitute the proceeds on an indebtedness of the first indorsee to him, purchases *and pays full value for* the identical proceeds, instead of purchasing them *on credit*, as he would do if he did not so apply them on an indebtedness of the first indorsee to him. His contract, viewing a *quasi*-bailment of money as a sale on credit, may be described as a contract of bailment for hire, for the purpose of custody and exchange for an agreed substitute, with obligation (or, if the contract be permissive only, with option) in the bailee to purchase the property obtained in exchange on credit or to hold it absolutely as purchaser in satisfaction of advances made on the faith that he might rightfully purchase the property obtained in exchange.

Perhaps the true ground of distinction is, that as negotiable *paper* may be held by a second indorsee either absolutely or as collateral security, he holds it absolutely, if at all, as *bona fide* purchaser for value, and holds it as collateral security, if at all, by estoppel against the owner; whereas the second indorsee "for collection" can only claim to hold *the proceeds* absolutely, since money cannot be held as collateral security, and the only ground on which he can be permitted to hold them, is, that he is a *bona fide* purchaser for value.

But whether the true ground of the decisions above cited be purchase for value or estoppel, it is evident that the claim of the owner of the paper in those cases

was based on the fact that it *intended, and made a private contract with its immediate indorsee showing its intention, to remain a true bailor as to the paper and the proceeds until the happening of an event, which had not happened when the insolvency of the first indorsee was disclosed.*

In what has been said above it has been assumed that the contract between owner and first indorsee "for collection" provides for the creation of the relationship of creditor and debtor between them only in case the specified event upon which the creation of this relationship is to depend arises before the insolvency of the first indorsee is disclosed. But, whether the owner does or does not make it a term of a contract between him and his indorsee "for collection," entered into for the purpose of defining the event upon which the relation of creditor and debtor shall exist, the law will read into the contract a provision which makes the existence of that relationship conditional upon the specified event happening before the insolvency of the indorsee "for collection" is disclosed. This is also settled by the case of *Commercial Bank* v. *Armstrong, Receiver*, above referred to. The plain reason of this is, that the owner of the paper will not be presumed to have intended the relation of creditor and debtor to exist in his favor against a person or corporation which is not a going concern, habitually paying its debts on demand, since the advantage to the owner of such relation depends wholly upon his ability to obtain payment of his debt on demand. Consequently any contract made by the owner of negotiable paper for the purpose of specifying the event, upon the occurrence of which the first indorsee "for collection" shall become a *quasi*-bailee of (debtor for the amount of) the pro-

ceeds, will be construed as though it contained the words, "provided that event occurs before the insolvency of the first indorsee is disclosed."

So, doubtless, any custom of business that the relationship of creditor and debtor shall exist between indorser "for collection" and his indorsee will be construed as containing, by implication, a similar condition; and the case of *Commercial Bank* v. *Armstrong, Receiver*, may doubtless be claimed as an authority to this effect.

Plainly, also, the happening of the specified event before the insolvency of the first indorsee "for collection" is disclosed is essential to the idea of estoppel against the owner of the paper in favor of a second or subsequent indorsee "for collection" which has dealt with the proceeds as *quasi*-bailee and has given value or extension of credit in the belief that it might rightfully do so, or to the idea that such second or subsequent indorsee might claim protection as a *bona fide* purchaser; since such second or subsequent indorsee is held to know that the owner of the paper could not have intended to become a *quasi*-bailor (creditor) of an insolvent person or corporation, *i. e.*, is charged by implication of law, with notice that the owner of the paper has no intention to become a *quasi*-bailor (creditor) of his immediate indorsee as to the proceeds, provided the insolvency of the first indorsee is disclosed before the intention of the owner to become *quasi*-bailor (creditor) of the first indorsee has become fixed and absolute by the happening of the specified event.

The plaintiff in error in this case has every equity which existed in favor of the Commercial National Bank case and more. The plaintiff in error is a *bona*

fide purchaser of the proceeds as fully as the indorsee banks in the Commercial National Bank case were, and the defendant in error is far more completely and conclusively estopped to claim as against the plaintiff in error, than was the Commercial National Bank to claim against the Receiver of the Fidelity. This is true because:

1. The German-American National Bank made a private contract with the Fidelity, its indorsee "for collection," that it should occupy the relation of true bailor as to the Fidelity *only until the paper was paid.*

(Record, pp. 15, 28.)

The proposition of the Fidelity Bank, which defendant in error accepted was: "We will credit sight items on any point in the United States east of Illinois, where there are banks, at par; and make *collections* on same points which, *when paid, will credit* at par; also your checks upon the principal cities, *allowing you two and one-half per cent. on daily balances calculated when monthly statements are rendered*; and will remit *for your credit* to New York *against your balances* at any time you may desire, without charge; or will ship you currency, express charges at your cost." The defendant in error was to "credit at par" all Peoria collections sent it by the Fidelity. (Record, pp. 15, 16, 28, 29.)

The defendant in error treated the draft in question as a "sight item," and not as a collection at all, debiting it, before transmission, against the Fidelity.

(Record, pp. 17, 31.)

2. The German-American National Bank failed to give notice of any intention as to its relation to the proceeds, whereas it might have given notice to all the world by indorsement of the paper with apt words to

signify this intention. The indorsement was simply "for collection." (Record, pp. 16, 30.)

5. The agreed event upon which the relation of creditor and debtor was to arise happened before the insolvency of the first indorsee was disclosed (this case differing from the Commercial Bank case *in favor of the plaintiff in error in this case*, in this, that in that case the specified event had not happened when the insolvency of the first indorsee was disclosed.)

(Record, pp. 15, 16, 23, 24, 25, 28, 29, 36, 37, 38.)

4. The indorsement "for collection" was to a bank, an institution which habitually does business as *quasi*-bailee and collects negotiable paper through other banks, of which custom of business the German-American National Bank had full knowledge. The custom of banks in this respect is specially found.

(Record, pp. 16, 26, 27, 30, 40, 41.)

Not only was the indorsement to a bank presumptively doing collection business through other banks as *quasi*-bailees of the proceeds; but, upon the facts specially found in this case, the first, second and third indorsee banks,—the Fidelity, the plaintiff in error and the First National Bank, of Terre Haute, were all doing business under *contracts* which required that each should become the *quasi*-bailee of its indorser as to the proceeds of collections.

It is specially found that the Fidelity and the plaintiff in error were doing business under a contract which made the plaintiff in error a debtor for the proceeds of all collections sent it by the Fidelity. The proposition of the Fidelity, accepted by plaintiff in error was: "We desire a reciprocal account in you city *which will keep a credit balance with us. We will credit*

all items not on your list at par and allow you two and one-half per cent. on daily balances, calculated with monthly statements, and remit New York for your credit any time you desire, free of charge." (Record, 20, 33, 34.)

It is specially found that the plaintiff in error and the First National Bank, of Terre Haute, were doing business under a contract whereby they kept mutual and reciprocal collection accounts, and whereby "*the debit balances arising as the result of the collection and other business between said banks*" were "settled periodically * * * by remittances of money or exchange *by the debtor bank to the creditor bank.*" (Record, pp. 22, 35, 36.)

Each indorser bank instructed its indorsee that the draft was "*for collection* AND CREDIT."

(Record, pp. 17, 19, 22, 30, 32, 35.)

5. The Old National Bank had extended credit to the Fidelity Bank as first indorsee on the faith that it had the right to deal with the proceeds as *quasi*-bailee.

(Record, pp. 26, 39.)

6. The Old National Bank had actually received the proceeds before the insolvency of the Fidelity was disclosed and had elected to apply them as a credit on an indebtedness of the Fidelity to it, greater than the amount of the proceeds. (Record, pp. 23, 37.)

7. The suit not only in form, but in fact, was against the Old National Bank as second indorsee "for collection." (Record, pp. 1, 17, 30.)

The case thus becomes one of right to withhold money upon a banker's lien, which right was defined by this Court, speaking by Mr. Justice Matthews, in the case of *National Bank* v. *Insurance Company*, 104 U. S., 54, 71, as follows: "Ordinarily (a banker's lien) attaches in favor of the bank upon the securities and

moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but *against the unknown equities of all others in interest*, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion."

This language is quoted with approval in *Regues* v. *Dumont*, 130 U. S., 354, 391.

If the correctness of the third proposition be granted, therefore, the decision must be in favor of the plaintiff in error. But this would be on the assumption that the plaintiff in error has only as much equity as against the defendant in error as the receiver of the Fidelity Bank or the indorsee banks in whose interest he defended, had against the Commercial Bank; whereas, on the facts specially found, the plaintiff in error has a *much greater equity* against the defendant in error than the receiver of the Fidelity or the indorsee banks in the case of *Commercial Bank* v. *Armstrong, Receiver*, had against the Commercial Bank,—so much greater, indeed, that plaintiff in error contends that its claim of right to reversal of the judgment depends, not on the question whether the defendant in error has an equity of higher degree than that of plaintiff in error, but on the question whether the defendant in error *has any right, whether at law or in equity*, as against plaintiff in error.

This statement leads to the fourth proposition, which is as follows:

4. *If the owner of negotiable paper makes a contract with his indorsee, whether it be private to themselves or one of which he gives public notice to all the world, or one which*

the law implies by the silence of the parties and the custom of business, whereby the relation of creditor and debtor is to exist between himself and his indorsee "for collection" as soon as the proceeds exist as such, i. e., as soon as the paper is paid, or at any later stage in the transaction short of the actual receipt of the proceeds by him; the Court, whether the action is framed at law or in equity, will, if the event upon which the relation of true bailor and true bailee is to determine, and the relation of creditor and debtor is to arise, occurs while all the parties to the transaction are solvent, give effect to this contract in this respect and will hold that the relation of creditor and debtor is created between them upon the happening of the agreed event during the solvency of all the parties.

Upon the establishment of the relation of creditor and debtor, between the original indorser "for collection" and his immediate indorsee, all right of action by the original indorser "for collection" against a second or subsequent indorsee ceases, since such action, whether in form an action at law or in equity, exists, if the defendant is not a contracting party with the plaintiff, only when the plaintiff actually intends, or when the law, in the absence of any facts showing a contrary intention, presumes that he intends that a fiduciary relation should exist as to the property involved in the transaction between himself and any holder thereof, which fiduciary relation the holder denies, thus attempting to make himself wrongfully the plaintiff's debtor; and since the fiduciary relation between the plaintiff and his immediate indorsee, as to the property in question (the proceeds, which are the agreed substitute of the property originally involved,) through which the fiduciary right against the second of subsequent endorsee must be derived, has, ex hypothesi, under the contract rightfully ceased.

This proposition is so plainly equitable that no elaboration seems necessary. It would be strange, indeed, if a Court of equity would give to a party the right to charge persons or corporations as holders of property under a trust, which, for the purpose of gaining a benefit to itself, it had contracted should not be charged with the trust in a certain contingency, and which contingency has occurred. This would be, to allow a party to blow hot or cold according as he might deem it for his interest. Much less will a Court of law undertake to give to a party rights which he has once parted with in order to gain a benefit. That an owner of negotiable paper, who contracts with his indorsee "for collection" that the proceeds are "for credit" at a specified stage in the transaction does part with his right to charge the proceeds in the hands of his indorsee with a trust, the instant the agreed event occurs, is manifest, if effect be given to the contract of the parties; and that effect will be given has been shown above. Especially will the Courts not seek to put a strained interpretation upon a contract in order to help out a party which has voluntarily and upon a sufficient consideration deprived itself of an equity which it might have had, when the contract is in this respect in accordance with the habitual custom of business in which the contracting parties are engaged.

That an indorser "for collection" loses all rights against a second indorsee the instant the first indorsee rightfully becomes a *quasi*-bailee, and hence a debtor, is manifest.

The transaction of indorsement "for collection" is not one of that class in which the power of the first agent really extends only to the appointment, in behalf

of the principal, of another agent, and in which the agent so appointed becomes the agent of the principal as a contractor with the principal through the medium of the first agent. On the contrary, the transaction of indorsement "for collection" "looks mainly to the thing to be done," and the responsibilty of the indorsee "for collection" extends to all necessary and proper means to accomplish the object, by whomsoever used, so that there is no privity of contract between the indorser "for collection" and the second or subsequent indorsee; and hence no right of action in contract or in tort founded on contract.

Exchange National Bank v. *Third National Bank*, 112 U. S., 276, 290.

Hoover v. *Wise*, 91 U. S., 308.

The doctrine of privity at law, as applied to a suit between an indorsee "for collection" and his second or subsequent indorsee, is nothing more nor less than another statement of the equitable doctrine of the right to follow trust *property*. The right of action is *in rem*, though when the *res* is *wrongfully* destroyed, it becomes an action in *personam*. The action of trover, or for money had and received, lies against a trustee who has converted a trust fund to his own use because the thing converted is *money*; the action of trover lies where the property converted is goods, wares or merchandise; or the owner, at his election, may sue in equity for an accounting, or if the trustee is insolvent, may bring a suit to have a trust declared and enforced against the trust property, or property of the same kind owned by the insolvent at the time of his insolvency. But whatever the form of action, it depends upon the existence of a *trust* relation which the owner of the

porperty *intended* to attach to the specific *property* involved in the transaction, and which the defendant or the defendant's representative denies. On this subject, see:

1 Story on Equity Jurispeudence, Secs. 460 464.
Story on Agency, Secs. 229, 230, 231.
National Bank v. *Insurance Company*, 104 U. S., 51.

When the owner has contracted with his immediate indorsee "for collection" that he has no intention of holding the indorsee as a trustee of the proceeds after the happening of a certain event, during the solvency of all the parties, plainly his right fails upon the happening of that event, as against *the property* (the proceeds) whether they be in the hands of the second or a subsequent indorsee, because his right to charge them as trustees, is *derived* wholly through his contract right with the first indorsee to charge the *property* with a trust.

The relation between the indorsee "for collection" and a second or subsequent indorsee, in so far as it may be regarded as contractual, is wholly *implied* from the holding of property with notice of the owner's intention as to the property. Hence the law will not imply a contract, against the intention of the owner, expressed in his contract with his immediate indorsee "for collection."

In the case at bar all the facts necessary, under the fourth proposition, to relieve the plaintiff in error, as a second indorsee "for collection," from liability existed. It is specially found by the Court that:

1. The German-American National Bank, plaintiff below, made a contract with the Fidelity National

Bank, its first indorsee "for collection," that the Fidelity should become a *quasi* bailee of (debtor to the amount of) all collections WHEN PAID.

(Record, pp. 15, 16, 28, 29.)

The Fidelity National was dealing with the plaintiff in error under a contract to the same effect; as was likewise the plaintiff in error with the First National of Terre Haute. (Record, pp. 19, 20, 22, 33, 34, 35, 36.)

The defendant in error indorsed the draft "for collection" to the Fidelity, and transmitted it to the Fidelity in a letter stating that it was "*for credit.*"

(Record, pp. 17, 30.)

The Fidelity indorsed the draft "for collection" to the plaintiff in error and transmitted it to plaintiff in error in a letter stating that it was "*for credit;*" and the plaintiff in error indorsed it "for collection" to the First National of Terre Haute, and transmitted it to the First National in a letter stating that it was "*for credit.*" (Record, pp. 19, 22, 32, 35.)

2. The draft in question was paid before the insolvency of the first indorsee (the Fidelity National) was disclosed, it having been paid before the close of the Fidelity on June 20, 1887, and the insolvency of the Fidelity having been disclosed by its failure to open its doors at the beginning of banking hours on June 21, 1887, it having transacted its banking business as a going concern up to the close of banking hours on June 20, 1887. (Record, pp. 23, 24, 25, 36, 37, 38.)

Under the above circumstances, it is submitted that the Court may lawfully consider the contract of the parties, and give effect to it, and that it will do so, and will hold that all fiduciary right of defendant in error against the Fidelity as to the proceeds of the draft and

hence all right against the plaintiff in error, ceased when the paper was paid, and that the Fidelity National Bank was, at the time its insolvency was disclosed, the sole debtor of the defendant in error for the amount of the proceeds of the draft. This would have been for the advantage of the defendant in error, had the Fidelity continued solvent. By the terms of the contract, the Fidelity Bank, the bank in which the defendant in error had confidence, was to become the debtor of defendant in error, at the earliest possible instant, liable to pay its debt to defendant in error on demand, and defendant in error would have thereby saved all expense of insurance and transportation of the proceeds.

To allow the defendant in error now, after defendant in error has obtained all it bargained for, to assert that the contract has no meaning, is contrary to equity and justice, and especially is it so, as against the plaintiff in error, which is an indorsee not a party to any contract with defendant in error and which had no notice of any intention, (and could not have had notice of such intention, since the defendant in error had, in fact, no such intention), on the part of the defendant in error to have the proceeds of the paper treated otherwise than as the custom of bankers permits or requires, *i. e.*, as the property of the banker subject to the bank's obligation to return a like amount on demand as a *quasi*-bailee and debtor, and which has given extension of credit to its immediate indorser on the faith that it might so deal with the proceeds.

When this case was argued in the Court below, the only two decisions of this Court involving the rights

and liabilities as between the owner of negotiable paper and a second or subsequent indorsee "for collection" were the cases of *Hoover* v. *Wise*, 91 U. S., 308, and *Exchange National Bank* v. *Third National Bank*, 112 U. S., 276. These cases held that where the action is purely *in personam*, the second or subsequent indorsee "for collection" is not the agent of the owner. In the case of *Hoover* v. *Wise*, the suit was *against the owner* by the assignee in insolvency of the second indorsee "for collection," to charge the owner for fraud of the second indorsee "for collection;" and the Court held that the owner was not responsible for the fraudulent act of the second indorsee. In the case of *Exchange National Bank* v. *Third National Bank*, the owner sued the first indorsee for negligence of the second indorsee in failing to obtain the acceptance of drawee; and the Court held that the first indorsee was liable. Both these cases were based upon the principle that when the suit is based wholly on tort or contract, *i. e.*, when the suit is not either actually, or in effect, a suit to impose a trust upon the paper or its proceeds, as *property*,—there is no fiduciary relation between the owner and a second or subsequent indorsee; in other words, that the trust relation between an owner and a second or subsequent indorsee "for collection" is not a contract relation. Plainly this decision is not at all inconsistent with the owner's right of *property* in the paper and its proceeds depending upon his *contract*, express or implied, *with his immediate indorsee*. It can depend on nothing else.

The cases of *Hoover* v. *Wise*, and *Exchange National Bank* v. *Third National Bank*, therefore, are in no wise inconsistent with the case of *Commercial National Bank*

v. *Armstrong, Receiver*, nor are they inconsistent with a judgment for plaintiff in error in this case. They are, however, apparently opposed to the use of the word "agency" and "subagency" to define the relation between the owner of negotiable paper and his indorsees for collection. As his rights against all indorsees except the first are, by the necessary inference from those decisions, *property* rights, and not *contract* rights, the use of the word "bailment" to describe the transaction of indorsement "for collection" seems to be warranted for still another reason than that given above.

Not only are the cases of *Hoover* v. *Wise*, and *Exchange National Bank* v. *Third National Bank* not inconsistent with a judgment for plaintiff in error, but if their doctrine were to be extended so as to require the first indorsee to be treated as the personal agent of, and independent contractor with, the owner, and all subsequent indorsees as agents of their immediate indorsers but not agents of the owner, *i. e.*, as independent contractors with their immediate indorsers, it is evident that the judgment of this Court must be for plaintiff in error, because, upon this theory, there could never be any right of action in favor of the owner against a second or subsequent indorsee. Under such a construction of those cases, any act of the second or any subsequent indorsee which rendered it impossible for the first indorsee to perform the agency, would render the first indorsee liable, and solely liable, as agent or debtor, according to its contract with the owner, and upon the facts specially found in this case, the Fidelity Bank would have been solely liable to the defendant in error, as debtor, the instant the identity

of the proceeds was destroyed by the First National Bank of Terre Haute.

However, this Court has, by its decision in the case of *Commercial Bank* v. *Armstrong, Receiver*, perhaps made it improper for counsel to draw the inference from the cases of *Hoover* v. *Wise*, and *Exchange National Bank* v. *Third National Bank*, that it intended to deny the indorser "for collection" his *property* rights as against a second or subsequent indorsee "for collection," even though he has no *contract* rights.

Had the Commercial Bank possessed no property rights against the indorsee banks, it is difficult to see on what principle it was material for the Court to consider whether or not the Fidelity was indebted to the indorsee banks, unless the credit by the indorsee bank on an indebtedness of the indorsee bank to it, equal to or greater than the proceeds is to be regarded as equivalent, by the custom of bankers, to a transmission of the identical proceeds by the indorsee to the agent bank; while a credit, not against such an indebtedness, would not be equivalent to a transmission.

But, whether the indorser "for collection" has no rights whatever against the second or subsequent indorsee, or whether his right is a property right only, the argument presented in this brief makes necessary, it is submitted, a reversal of the judgment of the Court below.

Plaintiff in error therefore claims that, under the decisions of this Court, the defendant in error was, upon the facts specially found, not entitled to judgment in the Court below, and that the Court below, in its conclusions of law that, upon the facts specially

found, the defendant in error was entitled to judgment, . erred.

Plaintiff in error therefore asks that the judgment of the Court below may be reversed.

Respectfully submitted,

ALPHEUS H. SNOW,
Attorney for Plaintiff in Error,
JOHN M. BUTLER,
Of Counsel.
BY ALPHEUS H. SNOW.

Indianapolis, Ind., April 9, 1894.

Office Supreme Court, U. S.
FILED.
JUN 5 1894
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~221~~ 85

THE OLD NATIONAL BANK OF EVANSVILLE, IND.
Plaintiff in Error,

vs.

THE GERMAN AMERICAN NATIONAL BANK
OF PEORIA, ILL.
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

PAXTON & WARRINGTON,
DUNCAN & SMITH,
Attorneys for Defendant in Error.

Baker-Randolph Co.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

NO. 381.

THE OLD NATIONAL BANK OF EVANSVILLE, IND.,
Plaintiff in Error,

vs.

THE GERMAN AMERICAN NATIONAL BANK,
OF PEORIA, ILL.,
Defendant in Error.

This action was brought by The German-American National Bank against The Old National Bank to recover the proceeds of a certain draft, collected by the plaintiff in error. There was judgment for the plaintiff in the court below; from that judgment a writ of error is prosecuted; such is the basis of the proceedings herein.

There is no occasion for any reference to the pleadings in this cause, as no question is made relative thereto. The cause being at issue, trial by jury was expressly waived by proper stipulation in writing. The plaintiff in error at the proper time requested that the court make special findings of fact. The court did so. There is no question made but that such findings are within the issue, or that the special findings are properly in the record.

The error assigned upon the record in this cause challenges the correctness of the conclusions of law stated by the court below upon the facts so specially found. The special findings of fact are found at pp. 14 to 28 of the printed record, and are simply repeated from pp. 28 to 41 in the Bill of Exceptions.

So that it is apparent that the only question which this court has to decide is whether or not the Circuit Court erred in its conclusions of law. The plaintiff in error asserting and the defendant in error denying such error on the part of the Circuit Court.

The finding consists of thirty-six propositions. Many of the facts contained therein were deemed immaterial by counsel for defendant in error, as also by the Circuit Court (see statement of Judge Woods at top of p. 28 of the record), but were inserted because counsel for plaintiff in error conceived them to be material in the proper consideration of the cause.

First. What are the Material Facts Found?

Counsel for defendant in error conceives the following to be the material facts, stated in their chronological order:

1. The correspondence between the Fidelity National Bank of Cincinnati, Ohio, and the defendant in error, consisting of four letters, found on pp. 15 and 16 of the printed record.

2. The purchase and ownership by the defendant in error of the draft, the proceeds of which are in controversy in this action. P. 16.

3. The indorsement of said draft to said Fidelity National Bank of Cincinnati, for collection, in the manner and form prescribed by the Fidelity National Bank, and its transmission to said Fidelity National Bank for collection and credit, as stated in the fourth and fifth propositions of the special findings—pp. 16 and 17, findings 2 and 4.

4. That the defendant in error never at any time drew drafts against collections transmitted to the Fidelity National Bank until it had received notification from the latter of payment thereof. P. 18, finding 8.

5. That upon the receipt of such draft, it was not entered upon the ledger account of the Fidelity National Bank with the

defendant in error, but was simply entered in the collection register. Findings 9 and 10, p. 18.

6. The indorsement of said draft by the Fidelity National Bank to the plaintiff in error "for collection" and its transmission for "collection and credit" to plaintiff in error. Finding 13, p. 19.

7. The fact that it was not charged by the Fidelity National Bank to plaintiff in error in its ledger account with the latter, but simply entered upon the collection register. Finding 12, pp. 18 and 19.

8. The fact that the plaintiff in error, upon receipt of such draft, made no entry thereof in its ledger account with the Fidelity National Bank, but simply entered it for collection upon its collection register. Findings 15 and 17, p. 21.

9. The indorsement of said draft by plaintiff in error to the First National Bank of Terre Haute, Indiana, "for collection for account of" plaintiff in error, and its transmission by the latter to the former for collection and credit. Finding 18, p. 22.

10. The receipt of said draft by the First National Bank of Terre Haute, Indiana, on June 20, 1887, its collection by said bank from the drawee between 2 and 3 o'clock on the afternoon of said day; the credit of the plaintiff in error by the said First National Bank of Terre Haute after the receipt of such payment, and the notification of such credit by the First National Bank of Terre Haute, by letter posted at Terre Haute at or about 4 o'clock in the afternoon of said day, and which reached Evansville about 1:30 A. M. of the 21st, and was delivered to plaintiff in error about 8 A. M. of said day. Findings 20, 21 and 22, p. 23.

11. The banking hours of the Fidelity National Bank, the Old National Bank and the First National Bank were from 9 o'clock A. M. until 3 o'clock P. M. of each day. Finding 22, p. 23.

12. That the Fidelity National Bank had been insolvent for ten days prior to June 20, 1887, although that fact was unknown to either plaintiff or defendant in error. That on the morning of June 20, 1887, Mr. Eugene Powell came to said Fidelity National Bank and entered upon the work of its examination. In the afternoon of that day the directors of said bank had a meeting at the office of the bank, which continued until after the close of banking hours, during which time the bank kept its doors open and trans-

acted such business as offered. That immediately after the adjournment of the meeting of the directors, Mr. Powell, as bank examiner, took possession of the bank, had the combination of the safe changed, of which combination he took possession. The directors of the bank met early in the morning, and at 8:30 announced to the officers of the bank it would not open, and it never did open thereafter. But Mr. Powell, as such bank examiner, remained in possession thereof until a receiver was appointed. Findings 26 and 27, pp. 24 and 25.

13. No entry was made upon the books of the Fidelity National Bank charging the plaintiff in error or crediting the defendant in error with the proceeds of said draft until the 26th day of July, when the receiver of the Fidelity National Bank made such entries as of the date of June 20. Findings 29 and 30, p. 25.

14. There was no actual remittance of the proceeds of such draft ever made by defendant in error to the Fidelity National Bank. Finding 31, p. 25.

15. Demand was made by defendant in error for the proceeds of such draft prior to the bringing of this action.

Such we conceive to be the essential and material facts found by the court.

Before proceeding to discuss what are the legal results to follow from such facts, we desire to show that throughout their argument, counsel for plaintiff in error have assumed a fact, which they make the very foundation of their argument for reversal, to have been found, which was not found.

The fact thus assumed to have been found is, that the plaintiff in error had, prior to the disclosure of the insolvency of the Fidelity National Bank, which he assumes to have been 9 o'clock on the morning of June 21, credited the First National Bank of Terre Haute and charged the Fidelity National Bank with the proceeds of the draft in controversy.

Thus, at p. 8, of brief of plaintiff in error: "This letter (*i. e.* from the First National Bank of Terre Haute, Indiana, of June 20) was received by the plaintiff in error soon after 8 o'clock A. M., on June 21, 1887, *and the amount of the draft was immediately credited to the Fidelity National Bank by the plaintiff in error (the fact of such immediate credit being shown by the fact that*

credit was entered as a part of the business of the previous day (*June* 20), in accordance with the practice of the plaintiff in error with respect to transactions occurring before the beginning of banking hours). Record, pp. 23, 26, 37.

"The insolvency of the Fidelity National Bank was disclosed at 9 o'clock on the morning of June 21."

And again, at the top of p. 11, of their brief: "For at the instant the insolvency of the Fidelity National Bank was disclosed (at the opening of banking hours of June 21, 1887), the plaintiff in error had received the letter notifying it of its credit with its immediate agent, the First National Bank of Terre Haute, *and though it had given similar credit to the Fidelity on its books*, it had not transmitted the credit out of its hands, since it had not mailed to the Fidelity its letter of the notification of its credit."

And so again the same fact is assumed in the statement of the first proposition of plaintiff's argument on p. 13, and at divers other places throughout their brief.

There is no such finding of fact. At p. 8 of the brief, counsel refer the court to pp. 23, 36 and 37, of the record. Pages 36 and 37 are but a repetition of p. 23; and at one page the special findings are copied as part of the record in the cause, and at the other in the Bill of Exceptions.

So turning to p. 23 we get the facts as actually found. In finding No. 22 the fact is found that the letter was delivered to the plaintiff in error at or about 8 o'clock on the morning of June 21. In finding 24 we find that it was the custom of the plaintiff in error to enter upon its books each transaction as of the same day, which occurred between the beginning of banking hours upon one day and the beginning of banking hours upon the next business day. "In pursuance of said practice, the said letter having been received as aforesaid by the said Old National Bank prior to the beginning of banking hours on the said 21st day of June, 1887, the amount of said draft was by the said Old National Bank entered in its account with the said Fidelity National Bank as of June 20, 1887."

And this is all there is upon the subject. There is no finding of fact that it was entered in such account prior to 9 o'clock, the hour which counsel assumes as being the time when the insolvency

of the Fidelity was disclosed. That the time when said entry was made is not found directly as a fact is clearly shown by the extract already quoted from p. 8 of the brief of counsel: "The amount of the draft was immediately credited to the Fidelity National Bank by the plaintiff in error (*the fact of such immediate credit being shown by the fact that the credit was entered as a part of the business of the previous day*) June 20, in accordance with the practice of the plaintiff in error with respect to transactions occurring before the beginning of banking hours."

This clearly shows that counsel are asking this court to infer the fact that the credit was immediately made and before 9 o'clock, which fact was not found, from the finding that such entry appears as of the 20th. If the fact that such credit was made prior to 9 o'clock A. M. of June 21 was an essential or material fact, then the plaintiff in error must have procured such finding to be specifically made. Nothing is better settled than that a special verdict of a jury or a special finding of facts by a court must have a direct finding of every fact that is material. A fact not specifically found can not be interred from a fact which is found. A special verdict or a special finding of facts by the court can never be aided by inference or intendment.

If it shall be considered by the court that the special findings of fact in this case were made under the statute of the State of Indiana authorizing such special findings of fact and the statement of conclusions of law thereon (the proceedings were in strict conformity to such statute); and if it shall further be considered by the court that the practice in that behalf should be governed by the decisions of the Supreme Court of Indiana under such statute, then the Supreme Court of that State has by many decisions settled the question.

In Pittsburg, etc., R. R. Co. *v.* Spencer, 98 Ind. 186, at p. 193, the court say: "It is one of the oldest principles of the law that it is of the very essence of a special verdict that it state all the material facts, and that *the court will supply nothing by intendment.*"

And so again in Buchanan *v.* Milligan, 108 Ind. 433, the court say: "The judgment rests on a special finding of facts, and in such cases it is well settled that all the material facts essential to support

a judgment must appear, *for nothing can be supplied by intendment*," citing Indiana cases q. v.

But if it shall be considered that such special finding of facts is to be governed by the principles of the common law as applied to the analogous procedure of a general verdict, the same rule obtains at common law.

2 Tidds Pr. 897.
Langley *v.* Warner, 3 N. Y. 327.
Hill *v.* Covell, 1 N. Y. 522.
Seward *v.* Jackson, 8 Cowen 406.
Thayer *v.* Society United Brethren, 20 Pa. St. 60.
Barnes *v.* Williams, 11 Wheat. 416.
Prentice *v.* Weissinger, 8 How. 470.
Graham *v.* Bayne, 18 How. 60.

We apprehend that this court will not reverse the judgment of the Circuit Court by inferring a fact not found from a fact found, and especially so where, as in this case, there is no necessity for such inference.

Counsel for appellant in effect say, that because of the existence of three facts clearly found, viz.: 1. It was the custom of the plaintiff in error to enter all transactions occurring before 9 o'clock in the morning of any day, as though it had taken place on the preceding day. 2. Because the letter from the First National Bank of Terre Haute was actually delivered to plaintiff in error at or about 8 o'clock on the morning of the 21st of June, and, 3. There now appears an entry of such transaction on books of plaintiff in error as of the 20th of June; this court should infer a fourth fact not found by the court, viz.: that such entry was actually made prior to 9 o'clock of the 21st of June. We say *non constat*. It does not follow, that because the letter was actually delivered at the bank at or about 8 o'clock on the morning of June 21, when the hours of banking did not begin until 9 o'clock, that the officer charged with opening of the mail was present, opened it, delivered its contents to the book-keeper in charge of the particular book in which entries were made. It does not follow that such entry was not made later in the day and after the plaintiff in error had learned of the failure of the Fidelity National Bank, so as to reduce the indebtedness of the Fidelity to it as much

as possible. We do know that in the letter which the plaintiff in error antedated so as to make it appear that it was written on the 20th, before the Fidelity had failed, it announced to the Fidelity that it had credit for seventeen different collections, aggregating $12,985.27. See special finding 25, on p. 24 of the record. If all these remittances came in by the night mail, and with corresponding notices for other correspondents' collections, the bookkeeper would have been a busy man to have made all the entries before 9 o'clock.

But we need not urge such suggestions. It is sufficient to say that there is no finding of the fact which plaintiff in error makes the very basis for its argument.

Counsel also assume that the court below found that the insolvency of the Fidelity National Bank was disclosed at 9 o'clock on the morning of June 21. We think this is not a correct interpretation. The finding is that the Fidelity had been insolvent for ten days prior to June 20; that on that day Mr. Powell, as Bank Examiner, came to examine the bank and did so to *a certain extent;* that the Directors had a meeting in the office of the bank upon the afternoon of June 20, and that immediately upon the adjournment of the Directors' meeting, Mr. Powell, as Bank Examiner, took possession of the bank, had the combination changed, and took possession of the combination. Early the next morning the Board of Directors again met, and at 8:30 o'clock A. M. announced to the officers that the bank would not open, and the bank did not open.

If by "disclosure of the insolvency" is meant disclosure to the public generally, then the gentlemen upon the other side are correct in their interpretation of the finding. But we submit that the disclosure of such insolvency to the public is wholly immaterial. As soon as the insolvency of the Fidelity Bank was disclosed to its own officers, that moment its right to collect the draft in controversy and place the proceeds to the credit of defendant in error was at an end. This is the disclosure that is material to the present case. This disclosure was certainly made when the bank examiner after having examined the affairs of the bank to *a certain extent*, took possession of the bank on the afternoon of June 20th. From that time forward the bank was *in gremio legis*,

and no one will for a moment contend that from that time forward the Fidelity National Bank had any authority to receive the proceeds of any collections and place them to the credit of its correspondent; and the result would be the same whether the proceeds of such collections came in money, exchange or by the acceptance of a like credit upon the books of another correspondent who had made the collection.

SECOND. WHAT ARE THE LEGAL RESULTS OF SUCH FACTS?

We shall first very succinctly state our understanding of the law, so as to give a synopsis of our argument and conclusion in a brief space, and then by citation of authorities show that our conclusion is right.

Let us again take them up step by step in their chronological order.

1. What was the effect of the correspondence between the Fidelity National Bank, and the defendant in error preliminary to the opening of the account between them on the books of the Fidelity, construed in connection with the form of indorsement, and the letter of transmission, as between these two banks without reference to other banks or collection agencies?

We concede that the legal effect of the correspondence between the defendant in error and the cashier of the Fidelity National Bank was an agreement between these two banks by which the former was to open an account with the latter, upon which the latter was to pay interest at the rate of two and one-half per cent. on daily balances. And, of course, after any item was properly placed to the credit of the defendant in error in its said account with the Fidelity National Bank as to such item, the relation of debtor and creditor would exist between the banks named.

But as to collections sent by defendant in error to said Fidelity National Bank, indorsed in the form furnished by the latter, as shown by finding No. 2 on page 16: "Pay Fidelity National Bank, of Cincinnati, O., or order, for collection for German American National Bank, of Peoria, Ill.;" until the collections were actually made, the relation between these two banks was that of principal and agent. And this relation of principal and agent was not changed to that of debtor and creditor, until the Fidelity Nationa had first fully performed its duty as an agent for collection.

The phrase "We will credit sight items on any point in the United States east of Illinois, where there are banks, at par," contained in the first letter of Mr. Baldwin opening the correspondence (see p. 15 of the record) if it stood alone would seem to indicate that the defendant in error would have been entitled to a credit for a sight draft, such as the one in controversy, immediately upon its receipt by the Fidelity National Bank. This would manifestly have been to the advantage of the defendant in error, and to the disadvantage of the Fidelity National Bank, for as soon as such collections were placed to the credit of the defendant in error, it would be bearing interest. We apprehend that this explains why the Fidelity caused to be prepared and furnished to the defendant in error the rubber stamp making the indorsement in the language as above stated, as by so doing the time of its actual credit in the account would be postponed, until the collection was actually made and proceeds received. And, although the defendant in error might have been entitled to demand credit immediately upon the receipt by the Fidelity so as to start it to drawing interest; yet this provision of the contract being for its benefit, it might waive that right, and direct that it should not be placed to its credit, until the collection was actually made and the proceeds received. And that is precisely what the defendant in error did in the case of this draft.

It, in the letter transmitting the draft, stated that it was for collection and credit. See finding 4, p. 17. This phrase "for collection and credit" had in the law a fixed and definite meaning, viz.: That the collection was first to be made and completed, and then the credit to be given. And under such instructions the Fidelity National Bank had no right to make the credit until the collection was completed.

And that the Fidelity National Bank thus understood this transaction is shown by the fact that while in other instances it had credited sight items on receipt in its ledger account with the defendant in error, the draft, the proceeds of which are in controversy, was not so credited, but was treated strictly as a collection. See special finding No. 9 on p. 18.

2. What was the effect of such preliminary correspondence, such form of indorsement, such letter of transmission, and the

conduct of the Fidelity and the defendant in error, as to the plaintiff in error and the First National Bank of Terre Haute, so far as the last named bank may be concerned in the issue of this controversy?

The indorsement in the form above set forth was clearly a restrictive indorsement, showing on its face that the draft belonged to the defendant in error, that the plaintiff in error was but an agent for its collection, and this fully gave warning to any and every bank to whom it might be subsequently sent in course for collection, that the proceeds of such draft could not be applied against any indebtedness to it by the bank from whom it had received such draft for collection. In the absence of some such restrictive indorsement, thus giving warning to each bank into whose hands the draft might come in process of collection, any such bank having a mutual and reciprocal collection account with its correspondent, receiving such draft with instructions to collect and credit, would have had the right to presume that the draft was the property of the bank from whom it received it, and have acted accordingly. Being thus warned, no one of the banks in the line of collection could act upon any other hypothesis than that defendant in error was the owner of the draft and of the proceeds; that each subsequent receiver thereof was but an agent for its collection, and all must govern themselves accordingly. The result, of course, would be that each bank must remit proceeds to the one from whom it received it, *until the proceeds actually came to the owner*. As to precisely when the proceeds in this case would actually come to the owner, in the sense in which this phrase is now thus used, we will discuss a little later.

But it may be said that the owner, the defendant in error, was bound to know when he sent this draft to the Fidelity, that the latter would transmit it for collection through other banks, and that it would have mutual and reciprocal accounts with the banks to which it was transmitted, in which such collections were charged as debits and credits respectively. We concede the first part of this proposition, that the defendant in error must have taken cognizance that the Fidelity would transmit the draft to another bank for collection. But we deny that it must have understood that the bank to whom it was thus transmitted would suppose that it

had the right to treat it as a credit to the account of the Fidelity. The very form of the indorsement absolutely forbade any such supposition or conduct. And so of the relation between each succeeding pair of correspondents. If the Fidelity and the Old National Bank, plaintiff in error, had mutual accounts in which, as between themselves, it was proper for the latter to treat such draft as an item for debit and credit in such account, that matter could not in the least affect the rights of the defendant in error. And if the plaintiff in error should at any time in the course of the transaction make any such entry upon its books, right enough as between it and the Fidelity, such entry as against the defendent in error was wholly void of meaning, and immaterial. So that all the findings as to what was the custom of the Fidelity, the old National of Evansville and the First National of Terre Haute were wholly immaterial.

Any such entry as between the plaintiff in error and the Fidelity was provisional, and its ultimate force depended upon whether the duty of the Fidelity, as agent for defendant in error, was ever fully performed so that the relation of debtor and creditor arose as to this draft, as between the defendant in error and the Fidelity.

This requires that we should look a little more carefully into the question when the one relation ended and when the other began, or, in the course of events, should have begun. It is plain enough that if there had been no arrangements between the defendant in error and the Fidelity for the opening of an account by the former with the latter, the duty of the latter upon receiving the proceeds of the collection, in whatever form, was to at once transmit the same to the defendant in error. Its duty as collecting agent would not have ended until the remittance was received by defendant in error. We suppose this will be disputed by no one. And in such case, the relation of debtor and creditor could never have arisen—there would be no room for it.

Now the fact that there was an arrangement by which after the relation of principal and agent between defendant in error and the Fidelity, the relation of debtor and creditor was to arise, does not in the least affect the *principle involved*, viz., that the collection

must be complete before the relation of debtor and creditor arises, although the application of the principle is somewhat different.

In the former case the collection was complete when the money was actually received by the defendant in error at its banking house in Peoria, Illinois. But under the arrangement between the Fidelity and the defendant in error, by which *after the collection was made*, the money was to be deposited by the Fidelity to the credit of the defendant in error, when such *credit was actually made on the books of the Fidelity* the collection would have been complete, for the money then would as actually come to the possession of the defendant in error, as if it had been transmitted to it at Peoria. But until the credit was actually given upon the books of the Fidelity the collection was not complete. It is not sufficient that it was credited to the Fidelity on the books of the plaintiff in error; notification by the plaintiff in error of the collection and its credit by it to the Fidelity was a condition precedent of the right of the latter to credit the proceeds to the defendant in error.

We think this can be made perfectly plain by an illustration in which every principle involved is kept intact. Suppose the draft bearing the same indorsement had been transmitted in a letter, which, instead of directing the collection and credit of the draft to defendant in error, the direction had been to the Fidelity to collect and pay to a depositor with the Fidelity on account of an indebtedness of the defendant in error to such depositor, and such depositor had directed when received it should be placed to his credit. And then suppose the Fidelity had transmitted to plaintiff in error just as it did in this case, and the plaintiff in error had transmitted to the First National of Terre Haute, and the last named bank had collected and had given notice, and the notice had been received, the entries made on the books of the plaintiff in error just as claimed in this case, and then before notification of such entry had been received by the Fidelity the latter had failed. Under such circumstances we suppose no one would contend that the collection was complete. Now it makes not a particle of difference as to when the collection was completed, whether the Fidelity was to deposit the proceeds to the credit of the defendant in error in its account with the Fidelity, or to deposit the proceeds to the credit of such other depositor.

If the authorities support us in the foregoing propositions, it is very clear that the judgment of the Circuit Court must be affirmed. So that our task now is to show that the authorities do support us in the foregoing claims. We thus state them:

I. Where there have been for several years mutual and extensive dealings between banks and an account current kept between them in which they mutually credited each other with the proceeds of all negotiable paper transmitted for collection, when received, and accounts regularly transmitted from the one to the other and settled upon these principles, and balances remitted when called for, *and upon the face of the paper transmitted, it always appeared to be property of the respective banks*, and the *collecting bank had no notice that the transmitting bank did not own the paper*, and such paper was transmitted by each of the two banks on its own account, *there is a lien* for the general balance of account, no matter who may own the paper.

Bank of Metropolis *v.* New England, 1 How. 234.
Bank of Metropolis *v.* New England, 6 How. 212.
Carroll *v.* Exchange Bank (W. Va.), 4 S. E. Rep. 440.

But in this statement there is a clear implication that if the paper thus transmitted was not credited when received, and the receiving bank had notice that the sending bank was not the owner, then there would be no such lien. Thus we are directly led to:

II. If, however, the receiving and collecting bank at the time of the mutual dealings with the bank sending the paper, had notice that the latter was *not the owner* of the paper so transmitted, but that it transmitted the same simply for collection merely as agent, then the collecting bank would not have the right to apply the proceeds of such paper, as against any indebtedness due to it from the transmitting bank, or to retain such proceeds against the owner of the paper for its benefit as against the general balance of its account with such transmitting bank.

In Bank of Metropolis *v.* The New England Bank, 6 How. 212, at p. 227, CH. J. TANEY stated the following to be the proper form of an instruction in a cause where this question was involved: "If, upon the whole evidence before them, the jury should find that the Bank of Metropolis (in this case the collecting bank) at the time of the mutual dealings between them had notice that the

Commonwealth Bank (the transmitting bank), had no interest in the bills and notes in question, and it transmitted them for collection merely as agent, then the Bank of Metropolis was not entitled to retain against the New England Bank (the owner), for the general balance of the account with the Commonwealth Bank."

In that case the indorsement was such that it implied ownership of the drafts in the transmitting bank.

In Sweeney *v.* Easter, 1 Wall. 166, this court, MR. JUSTICE MILLER pronouncing the judgment, held that the following instruction to the jury in such a case correctly stated the law: "If Sweeney, Rittenhouse, Fant & Co. (the collecting bank), the defendants in this action, at the time of the mutual dealings between them and S. Harris & Sons (the transmitting bank), had notice Harris & Sons had no interest in the notes in question, and that they transmitted them for collection merely as agents, then the defendants are not entitled to retain against the plaintiffs (the owners of the paper), for the general balance of their account with S. Harris & Sons."

To the same effect are:

Cecil Bank *v.* Farmers' Bank, 22 Md. 148.

Blaine *v.* Bourne, 11 R. I. 119.

Hackett *v.* Reynolds, Lambertin & Co., 114 Pa. St. 328.

First National Bank *v.* First National Bank, 76 Ind. 561.

First National Bank *v.* Bank of Monroe, 33 Fed. Rep. 408.

City of Sherman *v.* Weiss, 3 S. W. Rep. 299.

Bank of Metropolis *v.* First National Bank, 19 Fed. Rep. 301.

First National Bank *v.* Reno Bank, 3 Fed. Rep. 257.

See also the cases cited in support of our fifth proposition, all of which likewise support this proposition.

III. Even if the collecting bank had no notice that the transmitting bank was merely an agent for collection, but regarded the latter as the owner of the paper transmitted, yet it is not entitled as against the owner to retain the proceeds unless credit was given to the transmitting bank, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted or expected

to be transmitted in the usual course of dealings between the two banks.

Carroll *v.* Exchange Bank, etc., 4 S. E. 440.
First National Bank *v.* Gregg, 79 Pa. St. 384.
Bank of Metropolis *v.* New England Bank, 1 How. 234.
Bank of Metropolis *v.* New England Bank, 6 How. 212.
Sweeney *v.* Easter, 1 Wall. 166.

And the fact that any one of the banks in the chain had a just claim against the bank from which it received the collection is not the giving of a new credit.

Wilson *v.* Smith, 3 How. 763.
First National Bank *v.* First National Bank, 76 Ind. 561.

IV. The indorsement of the draft, involved in this cause, "Pay Fidelity National Bank, of Cincinnati, O., or order for collection for German American National Bank, of Peoria, Ill.," was a restrictive indorsement, did not carry title to the bank receiving it under such indorsement, but on the contrary, gave notice to the world, and particularly to each bank receiving it in the progress of its transmittal for collection, that the bank from which it received it was not the owner thereof.

White *v.* National Bank, 102 U. S., 658.

In this case Mr. Justice Miller says: "The language of the indorsement is without ambiguity, and needs no explanation, either by parol or by resort to proof of usage. The plain meaning of it is that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. *It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser.* It seems to us that the court below correctly construed the effect of the indorsement to be to make White the agent of the bank for the collection of the money."

Counsel for plaintiff in error copies a part of this quotation, and says that Mr. Justice Miller spoke expressly as *dictum*. It is true that as to so much of the above quotation as refers to the question as to whether such indorsement could be varied or affected by parol evidence, the learned justice did not deem it necessary to the decision of that case to come to a positive conclusion. But it is

perfectly clear that the writer of the opinion did not intend to include so much of the foregoing quotation as refers to the force and effect of such indorsement in the limitation which he placed upon the other portion of the quotation. This is manifest from that very portion of the opinion which fixes the limitation. He says: "We are aware of the necessity of proceeding with great caution in a case of *first impression* in regard to questions affecting commercial transactions, and we do not therefore decide this one, because we do not think it absolutely necessary to the case."

But the question of the force of such indorsement was not one of first impression in the law or in this court, for in the case of Sweeney *v.* Easter, *supra*, at p. 173, the same Justice in speaking of a like indorsement had said: "The words for collection evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement with them, and warned the party that, contrary to the purpose of a general or blank indorsement, *this was not intended to transfer the ownership of the note or its proceeds.*"

The force and effect of such and equivalent indorsements has been settled by the courts for more than a century, and we certainly are not justified in consuming the time of the court in making extended quotations from the authorities, but content ourselves with their citation.

Treuttel *et al.* *v.* Barandon, 8 Taunt. 100.
Sigourney *v.* Lloyd, 8 Barn. & Cress. 622.
First National Bank *v.* First National Bank, 76 Ind. 561.
City Bank, etc., *v.* Weiss, 3 S. W. 299.
Bank of Metropolis *v.* First National Bank, 19 Fed. Rep. 301.
First National Bank *v.* Reno Co. Bank, 3 Fed. Rep. 257.
Clafflin *v.* Wilson, 51 Iowa 15.
Lee & Co. *v.* Chillicothe Branch Bank, 1st Bond 387.
Levi *v.* National Bank, 5 Dillon 104.
First National Bank, etc., *v.* Armstrong, 36 Fed. Rep. 59.
Fifth National Bank *v.* Armstrong, 40 Fed. Rep. 46.
Manufacturers' Bank *v.* Cont. Bank, 148 Mass. 553.
Cecil Bank *v.* Farmers' Bank, 22 Md. 148.

Blaine *v.* Bourne, 11 R. I. 119.
Freeman's Bank *v.* National Tube Works, 151 Mass. 413.
National Butchers' & Drovers' Bank *v.* Hubbell, 117 N. Y. 384.
Sutherland *v.* First National Bank, 31 Mich. 230.
Armstrong *v.* National Bank of Boyertown, 18 S. W. 411.

V. The indorsement "for collection and credit," or the transmittal of the draft indorsed "for collection for account of owner" constitutes an agency for *collection only until the collection is actually made;* it does not authorize the credit to be entered until the collection is complete; the duty is to collect first and then to credit.

In the First National Bank *v.* First National Bank, 76 Ind. 561, where, as here, the indorsement was for collection, and the letter transmitting the draft stated that it was for collection and credit, at p. 567 *et seq.*, the court say: "The letter of the plaintiff transmitting the check to the Cook County Bank did not contemplate that the latter bank should treat the check as its own and credit the plaintiff with the amount of it before collection. * * It is clear that the transaction between the plaintiff and the Cook County Bank did not make the latter bank the debtor of the plaintiff before collection, nor did it deprive the plaintiff of its right to the check or its proceeds before the collection by the Cook County Bank. * * The Cook County Bank then received the check merely as agent of the plaintiff for collection, with authority to credit the plaintiff with the proceeds when collected. The Cook County Bank transmitted the check to the defendant for collection, with authority to credit the former with the proceeds when collected. This would, perhaps, *in the absence of controlling circumstances*, have conferred the right on the defendant to credit the amount when collected, to the Cook County Bank in liquidation *pro tanto* of the debt which that bank owed the defendant. * * But the defendant was fully notified by the indorsement on the check that the Cook County Bank was not the owner of it nor entitled to its proceeds; that that bank was only the agent of the plaintiff for the collection of the check for account of the plaintiff."

The opinion in this case was by JUSTICE WORDEN who was, perhaps the greatest and most accomplished lawyer ever upon the Supreme Bench of the State of Indiana.

In the First National Bank of Circleville *v.* Bank of Monroe, 33 Fed. Rep. 408, on p. 411, Mr. Justice Wallace said: "Where, as was done in the present case, the customer gives instruction 'for collection and credit,' he merely expresses in terms what the law would imply if no instructions had been given. When paper is thus deposited to a banker for collection, the banker becomes the customer's agent to make collection, with authority to pass the proceeds *to the customer's credit, after they are collected; and he undertakes the duty of an agent for all the purposes of making the collection. He can not terminate his responsibility as an agent until he has fully discharged it, and has substituted in its place his unqualified obligation as a debtor. Until the banker becomes a debtor, and his obligation as such is complete and irrevocable, he remains an agent merely.*"

In re Armstrong, receiver of the Fidelity National Bank, 33 *Fed. Rep.* 405, JUDGE JACKSON, now of this court, speaking of the effect of such an indorsement, said: "By this restrictive indorsement the Winters Bank gave notice to every one into whose hands the paper might come of *its title to the note* and *its right to the proceeds*. The case presents no question between the Winters Bank and the Drovers' & Mechanics' National Bank of Baltimore. The latter does not claim, and under the special indorsement *giving it notice of the Winters Bank's right to the note and its proceeds, could not assert any valid claim to the fund, no matter what may have been the course of its business with the Fidelity Bank, nor how its accounts stood with that bank when the collection was made.*"

In Lee & Co. *v.* Chillicothe Bank, etc., 1 Bond. 387 at p. 390: "As before intimated, the words *credit my account* can not be supposed to have been used without a meaning and purpose. *They were clearly intended as a naked authority to Ludlow to receive the proceeds of the bill and credit them to the account of the Chillicothe Bank.* This is their fair import, and that they were so intended by Scott can not be doubted. He is the cashier of an important banking institution and may be presumed to be familiar with all the different ways of transferring negotiable paper."

The case of Levi *v.* National Bank of Mo., 5 Dill. 104, is a very instructive case. The substantial and material facts were: Plaintiff and defendants were bankers and mutual correspondents;

on June 18, 1877, the plaintiff transmitted to the defendant a draft indorsed to the latter for collection for account of former, in a letter stating that the same was for collection and credit. The draft was received by the defendant on the morning of June 19 and the amount thereof immediately credited by the defendant to the plaintiff. On the same day defendant presented the draft to the drawees, received the latter's check for the amount thereof on another bank, and thereupon surrendered it; the defendant took such check thus received by it from the drawee to the bank upon which it was drawn, and had it certified; thereafter and upon the same day the defendant suspended payment, with this certified check uncollected in its possession, which was the next day collected by the officers of the bank and mingled with the other funds of the bank. The action was against a receiver subsequently appointed to have the amount of the draft paid as a preferred claim. The character of the indorsement was discussed by MR. JUSTICE DILLON. The counsel for defendant had argued: "The letter transmitting the draft was simply asking for *credit*—the depositing of the Taussig draft by the plaintiffs in the defendant bank. The words "for collection and credit" mean "credit." While it is reasonable to suppose that the defendant bank would not give the credit until it was satisfied that it would obtain the money on the draft, yet the ultimate object of the plaintiff being 'credit,' if they receive the credit, it matters not to them whether the defendant bank received the money or not; and as soon as the defendant bank was satisfied to give the credit, as requested, the plaintiff's demand was complied with whether the collection was ever made or not."

To this JUSTICE DILLON responded: "The argument is fallacious. The words 'for collection and credit' do not mean that credit shall be given until the money is collected. And it does make a difference whether the defendant bank ever received the money or not. On this point the language of *Byles, J.*, in Sweeting *v.* Pierce, 7 C. B. (N. S.) 485, is applicable. He says: 'It is not disputed that the general rule of law is that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash, the probability is he will pay it over to the principal; but if he is allowed to receive it by means of a

settlement of accounts between himself and the debtor, he might not be able to pay it over, at all events it would very much diminish the chance of the principal ever getting it; and upon that principle it has been held that the agent as a general rule can not receive payment in anything but cash.'"

In National Butchers' and Drovers' Bank *v.* Hubbell, 117 N. Y. 384, at page 393, Peckham, Justice: "The letter accompanying the inclosures of paper amounted simply to a direction to credit after the collection was made, and up to the time the funds were actually received by the firm, it evidently could make no alteration in the law relative to indorsement for collection only." The indorsements and letters of transmittal were the same as here.

If anything can be settled by the adjudications, it is that the indorsement used in this case was restrictive, and gave notice to the defendant that the Fidelity National Bank was not the owner of the paper or of its proceeds. As was well said by the court in Lee & Co. *v.* Chillicothe Branch Bank, *supra*, officers of banks will be presumed to know the force and effect of such indorsements. Their meaning has been judicially determined for more than a hundred years; and we can not doubt that such forms are used because of their meaning thus judicially determined.

And yet we have in the brief of counsel for plaintiff in error a very long and labored argument through many pages, and through many successive steps, to show that this indorsement was ambiguous, and created a species of bailment known to the erudite lawyer, but of which the bankers were wholly ignorant, in order to come to two conclusions: First, that parol evidence was admissible to let in parol evidence, so as to vary the force and effect of the indorsement; and second, that the defendant in error was guilty of negligence in not adding something further to the language of the indorsement to show that it was to remain the owner of the proceeds. Such talk is idle. The cases cited clearly and beyond doubt do maintain the doctrine that the indorsement "pay to The Fidelity National Bank for collection for German American National Bank, of Peoria, Ill.," gave warning to all the world that the draft and its proceeds belonged to defendant in error. With great respect for the learned gentlemen upon the other side, we feel constrained to say, that their attempt to better the defini-

tion heretofore given by this court of the relation existing between corresponding banks under such indorsements only tends to create confusion where none existed before.

In our opinion there is but one point in this case as to which, under the adjudications, there can be a moment's doubt as to the law upon the facts found. That point is, as to when the collection of the draft shall be deemed to have been fully completed, so that the relation of debtor and creditor would arise between the defendant in error and the Fidelity National Bank, and thus put an end to the relation of principal and agent therefore existing. We of course concede, that if prior to the insolvency of the Fidelity National Bank, it had fully performed the duty of agent for collection, and had actually received the proceeds of the draft, and had placed them to the credit of the defendant in error, the defendant in error must have failed in its action below and the judgment must be here reversed. But if on the contrary, the relation of principal and agent had not been terminated by the full and complete collection of the draft, and the establishment of the relation of debtor and creditor, the judgment below was right and must be affirmed.

But for an expression used by MR. JUSTICE BREWER in the opinion by him pronounced in the case of The Commercial Bank *v.* Armstrong, 148 U. S. 50, upon which counsel for the plaintiff in error laid great stress, we would have felt that there was no room for doubt on this point. We think, however, that such expression when considered in connection with the facts in that case, and as applied thereto, is not in the least in conflict with the position we have taken, and affords the plaintiff in error no support. We will refer to this case again a little later.

There are two views of the point as to when the duty of collection was fully performed. The one is that as the collection of the draft involved in this controversy might be made by the Fidelity National Bank in various ways, as, for instance, by transmitting the draft by express and receiving the proceeds in currency or coin, or by transmitting the draft through corresponding banks and receiving drafts upon other banks therefor, or by receiving mutual debits and credits through the line of collecting banks; that as any of such means might have been fairly resorted

to by the Fidelity National Bank; and that as from the situation of the parties and the preliminary correspondence between the defendant in error and the Fidelity indicated, that such collections would be collected through corresponding banks; and that as between the Fidelity National Bank and the plaintiff in error a credit upon the books of the latter in favor of the former was the equivalent of a transmittal of the proceeds either by draft or in money, the collection should be deemed to have been complete the moment the entry of credit was made on the books of the plaintiff in error, provided such entry was made before the plaintiff in error had knowledge of the insolvency of the Fidelity National Bank.

The other view is that the plaintiff in error had full knowledge from the form of indorsement, that the Fidelity National Bank was not the owner of the paper or of its proceeds; that with such knowledge the plaintiff in error must know that it could not deal with the proceeds of such draft as the money of the Fidelity National Bank. That while the Fidelity National Bank had authorized the plaintiff in error to credit the proceeds of the draft to the former, so that as between these two banks such entry was proper, yet such entry did not in the least affect the rights of the defendant in error; and in event the proceeds of such draft failed, in fact, to reach the defendant in error, the plaintiff in error would yet be liable to the defendant in error therefor, notwithstanding such credit: that even conceding that the entry of such credit on the books of the plaintiff in error was equivalent to the transmittal of proceeds, the collection by the Fidelity National Bank would not be complete until the same instant, when it would have been complete had funds actually been transmitted; that is to say had the funds been transmitted, by draft or otherwise, the collection would have been complete when, and only when, such funds were actually received by the Fidelity National Bank and placed to the credit of the defendant in error, or at least when received by the Fidelity National Bank while it was solvent, and might rightly place such proceeds to the credit of the defendant in error; so of the collection by the Fidelity National Bank through the credit given it for the proceeds of the draft by plaintiff in error; the collection was complete when and only when the noti-

fication of such credit was received by the Fidelity National Bank and the credit given to defendant in error on its books; or at least such notification must have been received while the Fidelity was solvent and in such a condition as that it might rightly enter such credit to the defendant in error.

We think the latter view is the sound one and sustained by the authorities. In the absence of a judgment upon this point by this court, we can cite no authorities that will be binding upon it, for there is no court higher than this. But we can cite decisions of other courts which it seems to us must from their reasoning commend themselves to this court.

In re Armstrong, Receiver of The Fidelity National Bank, 33 Fed. Rep. 405 at p. 407, JUDGE JACKSON said: "It is too clear for argument that no act of the Drovers' and Mechanics' Bank, in the face of such an indorsement as the note bore, could convert the relation of principal and agent which existed between the Winters Bank and the Fidelity Bank in respect to the note and its proceeds into another and different relation of creditor and debtor. As against the Winters Bank, the credit which the Drovers' and Mechanics' Bank gave to the Fidelity for the amount of the collection, did not vest the latter with the legal and beneficial ownership of the funds represented thereby, nor did it have the effect of terminating the agency relation which the Fidelity Bank sustained towards the Winters Bank, for whose account the collection was to be made. The Winters Bank could on the morning of June 21, 1887, have made a valid demand upon the Drovers' and Mechanics' Bank for the amount of the note so collected for its account. *Before completing the collection by actually receiving the money from the Drovers' and Mechanics' Bank, or making counter charges and credits by which the fund would be placed in the Fidelity Bank subject to the right of the Winters Bank to draw against the same, the Fidelity Bank became insolvent, suspended business and its doors were closed.*

JUDGE JACKSON had very much to do with the administration of the assets of the Fidelity National Bank in the hands of the receiver; and these questions in almost every form were presented to him, argued by eminent counsel, and he gave them careful consideration, as appears from his many decisions found in the Federal

Reporters. And his opinion certainly is entitled to very great weight.

In First National Bank *v.* Bank of Monroe, 33 Fed. Rep. 408, at p. 411, JUDGE WALLACE expressed himself in the language already quoted in this brief on another point, a portion of which we again quote here: "When paper is thus delivered (*i. e.* thus indorsed for collection and transmitted for collection and credit) the banker becomes the customer's agent to make collection, with authority to pass the proceeds to the customer's account by a credit after they are collected; and he undertakes the duty of an agent for all the purposes of making the collection. He can not terminate his responsibilty as an agent until he has fully discharged it, and has *substituted in its place his unqualified obligation as debtor.* Until the banker becomes *a debtor and his obligation as such is complete and irrevocable, he remains an agent merely.* * * * * If the Fidelity Bank had credited the plaintiff with the proceeds of the draft while it was a going concern, nothwithstanding it had not actually received the proceeds, the question would arise whether the plaintiff would not be concluded and its position fixed as that of a creditor instead of a principal. * * *Up to the time when the receiver took posession of its assets, the Fidelity Bank had neither credited the proceeds of the draft to the plaintiff nor notified the plaintiff that the draft had been collected. It had not elected to terminate its character as an agent and assume that of a debtor to the plaintiff when it suspended business. It could not do this when in articulo mortis, and thus divest the plaintiff of title to the proceeds of the draft without disloyalty and injury to its principal.* The ordinary relation of banker and customer was then at an end, and the implied contract founded on that relation did not extend to the new situation."

How apt this language to the situation of the parties to this action, even at the moment when plaintiff in error claims the credit was made, viz., at or about eight o'clock on the morning of June 21. At that time the bank examiner was in full and complete charge of the bank, having had the combination of the safe changed on the evening of the 20th, and retaining it. The Fidelity had no right or authority at that hour, by any process, whether by receipt of actual proceeds or by receipt of credit from the plaintiff in error,

to accept the proceeds of such collection, and make the defendant in error its creditor for that amount.

In Levi *v.* National Bank of Missouri, *supra*, the bank to whom the draft was sent for collection had actually received a certified check on another bank for the draft, had surrendered it, and had actually credited the owner. But JUDGE DILLON held that the collection was not complete until the money was actually received on the draft; that the collecting bank had no right to credit, until the money was actually received.

See also on this point the case of the First National Bank *v.* First National Bank, 76 Ind. 561, and the quotations already made therefrom.

In Manufacturers' Bank *v.* Continental Bank, 148 Mass. 553, on p. 559, a case arising under a similar indorsement, the court say: "If a payment to the defendant as its agent, and an entry of credit by the defendant for the money would have passed the property to the Fidelity National Bank, if it had then been regularly doing business, *such a payment made after it was insolvent, and in charge of the comptroller had no such effect. The implied condition in reference to which both parties had ceased to exist.*"

In Sigourney *v.* Lloyd, 8 B. and C., where the indorsement was "Pay to Samuel Williams, Esq., of London, or his order, for my use," *Lord Tenterden, Chief Justice, said:* "The use of indorsement of this kind is not small, nor are they, as it seems to me, inconsistent with the interests and convenience of commerce. Such an indorsement will not prevent the indorsee from receiving the money from the acceptor when the bill becomes due. If he pay it to his principal, all will be well, but the indorsee must look to him for the application of it. It will have the effect of preventing a failing man from disposing of the bill before it becomes due, and from pledging it to relieve himself from his own debt at the expense of his correspondent. I can not see that the interests of commerce will be prejudiced by our holding that such an indorsement is restrictive. On the contrary, I think that the interests of commerce will thereby be advanced. It is said that it can not be expected that the bankers or others, when requested to discount such bills as this, should look into the accounts between the principal and agent. I agree it can not be expected that they should;

but still, if they take the bill so indorsed, they take it at their peril, and must be bound by the state of accounts between those parties."

In Armstrong *v.* National Bank of Boyertown, 18 S. W. 411, it was distinctly and directly held by the Court of Appeals of Kentucky that the receipt of the money by the collecting bank and crediting the proceeds to the transmitting bank without the actual transmission of the proceeds did not complete the collection and end the relation of principal and agent. At p. 413 the court say: "We therefore think collection of the draft by the Louisville Banking Company and entry of the credit to the Fidelity Bank did not have the effect of investing the latter nor changing the relation to appellee, for a mere usage between banks, whereby the collecting bank credits the transmitting bank with the amount collected instead of remitting is not alone sufficient to be set up against the real owner of notes or bills to deprive him of his rights."

It is not claimed here by counsel in error that the relation of principal and agent had terminated until at or about 8 o'clock on the morning of June 21, and at that time the bank was insolvent and *in gremio legis*.

From these decisions, as already stated, we would have had no doubt whatever that the collection was not complete and the relation of principal and agent, and not of creditor and debtor, existed between the defendant in error and the Fidelity National Bank but for the expression already referred to of MR. JUSTICE BREWER in Commercial National Bank *v.* Armstrong, 148 U. S. 50. We now desire to return to that case.

In that case the object of the action was to recover from the receiver of the Fidelity National Bank as a preferred creditor the full proceeds of certain drafts which had been collected through the Fidelity National Bank under a similar indorsement and under an arrangement which the court held created the relation of debtor and creditor between the Commercial Bank and the Fidelity as soon as the collection was fully completed.

At the time of the failure of the Fidelity a large number of drafts belonging to the Commercial Bank had been transmitted to the Fidelity bearing such indorsement and had by the Fidelity

been transmitted to its various correspondents with instructions "for collection and credit."

Certain of such drafts had been collected by the correspondents of the Fidelity National Bank and had been placed to the credit of the Fidelity, and after the failure of the Fidelity such correspondents had, upon the call of the receiver, transmitted the proceeds of such collection to the receiver; certain other of the drafts were collected by such correspondents after the failure of the Fidelity and the proceeds transmitted to the receiver. There was yet a third class where the correspondents had prior to the failure of the Fidelity collected the paper and credited the proceeds to the Fidelity National Bank, but where the Fidelity was debtor to such correspondent banks for a sum greater than such proceeds, and such correspondent banks had never transmitted such proceeds to the receiver; they had never come to his hands. The action was to recover all such proceeds as a preferred claim.

At the Circuit, JUDGE JACKSON held that as to the first two classes recovery could be had, but that as to the third class no recovery could be had for the reason assigned, that such proceeds had been mingled with the other funds of the bank so that they could no longer be distinguished, and hence no trust could be imposed upon them. Upon appeal this court affirmed the judgment of the Circuit Court upon both points, but assigned a different reason from that assigned by Judge Jackson at the Circuit, and it is in this reason that counsel for plaintiff in error seem to get great comfort. After stating very fully and forcibly that under the indorsement and arrangement between the Commercial Bank and the Fidelity the relation between these two banks was that of principal and agent until the collection was completed, and the collection of the first two classes not being completed until after the failure of the Fidelity, the proceeds thereof could be impressed with a trust, thus continues as to the third class:

"We also agree with the Circuit Court in its conclusions as to those moneys collected by sub-agents, to whom the Fidelity was in debt, and which collections had been credited by the sub-agents upon the debts of the Fidelity to them before its insolvency was disclosed, for there the money had practically passed into the hands of the Fidelity—*the collection had been fully completed.* It

was not a mere matter of book-keeping between the Fidelity and its agents, it was the same as though the money had actually reached the vaults of the Fidelity. It was a completed transaction between it and its sub-agents and nothing was left but the settlement between the Fidelity and the principal—the plaintiff. The conclusions of the Circuit Court were based upon the idea that these collections could not be traced because they had passed into the general fund of the bank. We think, however, a more satisfactory reason is found in the fact that by the terms of the arrangement between the plaintiff and the Fidelity the relation of debtor and creditor was created when the collections were fully made."

Now, as applied to the facts of that case and the purpose of that action, no criticism can be made upon the language quoted. The decision of the case was certainly right in any event. For while it is true that as between the Fidelity and its various correspondents to whom it had transmitted such paper for collection and credit, and also as between the Fidelity and the plaintiff in that action, such credit might be the same as though the money was actually in its vault for the purpose of establishing the relation of debtor and creditor it seems to us very certain that it was not the same as though it was in the vaults of the Fidelity for the purpose of impressing a trust upon it. As we understand the doctrine, so long as you can distinguish a fund you may trace it and impress a trust upon it; and the mere fact that money has been mingled with other money does not prevent the following of it into a mass, if the claimant can clearly show that his money is in the mass, but in order to impress the trust upon the fund he must be able to trace it in the mass. Now, the proceeds of the third class of paper above adverted to never did come directly or indirectly into the hands of the receiver. Clearly upon the facts of that case the money was not there to have the trust imposed upon it.

But, however that may be, we think it clear that the court, in using the above language, did not have in mind any such state of facts as we have here, and did not mean to say, that in a case where a sub-agent had received the proceeds of a collection, after the failure of the Fidelity, and after it was actually and completely in

the hands of a bank examiner, from whom it was transferred to a receiver, such sub-agent could, by a credit of such proceeds to the Fidelity, put an end to the relation of principal and agent between the Fidelity and the owner of the paper, and create the relation of debtor and creditor. [Since the preparation of this brief, we have procured copies of the briefs filed in that cause, and from them we find that no such case was there presented. No collection was involved, where the credit was made by the collecting bank after June 20. We say this on this statement found at page 13 of the brief of *Hon. Jno. W. Herron*, counsel for the receiver in that cause: "As stated before, the last statement of account was forwarded by the Fidelity on June 11, and included all items received to June 8, inclusive. The first credits not included in that statement, and remitted for were made on June 9, and other collections were made on each succeeding day until the 20th, the day preceding the closing of the bank."]

In such a case as we have in hand it does not, in our opinion, follow that because we could not have recovered as against the receiver of the Fidelity National Bank, the proceeds of such collection in full as a preferred claim, that we could not recover as against the plaintiff in error. Indeed we think quite the contrary. Had we filed our bill against the receiver to have a trust declared against the funds in his hands for the proceeds of the draft in question, we would have failed because we could not have traced the funds into the hands of the receiver. And there is another distinction between such proceedings. Had we proceeded against the receiver and recovered as against him, the loss must have fallen on the general creditors, for as between the Fidelity and the plaintiff in error, the latter had the right to credit the proceeds of the draft against the debt of the former to it. And so the general creditors would suffer by the conduct of the plaintiff in error. While, as against the defendant in error, the plaintiff in error had no right to make such credit, and when it is compelled to pay the defendant in error, it can get no advantage from its own wrong conduct, and simply comes in as a general creditor against the funds in the hands of the receiver of the Fidelity.

We can not think that this court in the cause now under review by the phrase "before the insolvency was disclosed," meant

before knowledge of insolvency was brought home to the sub-agent. The question of knowledge of the sub-agent is wholly immaterial. The moment the Fidelity National Bank discovered its own insolvency, that very moment its right to receive the proceeds of the collection was at an end. After that it could no more create the relation of debtor and creditor between itself and the defendant in error, by consenting to a credit to it on the books of the plaintiff, than it could by receiving the proceeds of such collection in money and placing them to the credit of the defendant in error.

The plaintiff in error has no equity to support the claim that he should have the benefit of a credit made after the Fidelity was in the hands of the bank examiner. When it made the credit, it knew the money did not belong to the Fidelity, but that it belonged to the defendant in error. It took all the chances that the proceeds should actually come to the owner. If it did so come to the owner, it was all right, and the credit was valid; if it did not, the credit would avail it nothing. It is idle for counsel to talk about the superior equity of the plaintiff in error. Both parties, one as much as the other, confided in the solvency of the Fidelity; neither has any advantage over the other in this regard. The defendant in error had not put the Fidelity in a position, where it could impose upon others and get a false credit upon the apparent ownership of the draft. Each took the chances of the insolvency of the Fidelity, with all the legal consequences which follows from insolvency. One of these consequences was that the moment insolvency intervened in such a sense that the Fidelity could not lawfully receive the proceeds of a collection and create the relation of debtor and creditor, that moment the right of the plaintiff in error to treat the proceeds as the money of the Fidelity was at an end, whether it knew of that fact or not.

In the First National Bank *v.* First National Bank, 76 Ind., JUDGE WORDEN, though not necessary to the decision of the case, clearly intimates his opinion that the plaintiff in error was obliged to take notice of the failure of the Fidelity so far as such failure affected the rights of the defendant in error.

Again, the plaintiff in error did not in any manner change its condition after the receipt of the proceeds of the draft to its injury.

Over and above all, there is no finding of fact that the plaintiff

in error had not knowledge of the precise condition of affairs at the Fidelity Bank when it made such credit.

We think that the several findings of fact as to the custom of banks are wholly immaterial. So far as those findings show custom to be in consonance with the legal effect of the indorsement used, the transmittal "for collection and credit," and the agreement between the Fidelity and the defendant in error, growing out of the preliminary correspondence, such custom is wholly immaterial, for the rights, duties and obligations of the parties are controlled by such indorsement, such transmittal for collection and credit, and such agreement. If it should be urged that such custom should in any way or measure be held to conflict with such indorsement, letters of transmittal and such preliminary agreement, then we say evidence of such custom would have been incompetent, and the finding wholly immaterial.

The expression of MILLER, JUSTICE in White *v.* National Bank, 102 U. S. already quoted.

In re Armstrong, JUDGE JACKSON said: "If that indorsement was subject to explanation or variation by parol evidence, *which is not conceded, etc.*" The precise question was not decided in that case, but there was a clear intimation as to the opinion of the court had the question been necessary to the decision of the cause, and such opinion is entitled to weight.

But the question has been expressly decided in other courts.

Third National Bank *v.* Clark, 23 Minn. 263.

Leavy *v.* Blanchard, 48 Me. 269.

Boone in his work on *Banking* at *Sec.* 207 thus states the law: "It is not competent to show by parol evidence that an indorsement for collection was intended as an absolute indorsement. Neither parol proof nor custom can be received to contradict the written indorsement."

We do not feel called upon to respond in detail to the argument of counsel for plaintiff in error.

That argument consists of two propositions: 1. That the collection was complete when the money was received by the plaintiff in error from the First National Bank of Terre Haute, and credit given by it to the Fidelity National Bank at or shortly after 8 o'clock on the morning of June 21, asserting that

such credit was thus given at that hour, and that that time was prior to the disclosure of the insolvency of the Fidelity.

We have shown that there is no such finding of fact as that the credit was made at the time assumed, and that no intendment will be made, and no inference of fact not found, to reverse the judgment of the trial court. And we take it that the counsel for plaintiff in error have altogether misconceived when the insolvency was disclosed.

2. That the collection was complete when the money was received on the draft by the First National Bank, of Terre Haute, on the afternoon of June 20; that at that instant the money would have been considered as received by the Fidelity, and the relation of debtor and creditor established between the Fidelity and the defendant in error.

They have made a long and labored argument, going into much abstruse learning and refinement, and might have imposed upon us great labor but for the fact that the authorities which we have already cited are very numerous and very uniform to the contrary of the conclusion which they seek to reach.

But this much we will say of their argument on this proposition; they have argued their case—at least it so seems to us—upon an entire misapprehension of the material fact which is confessedly the basis of their argument.

They seek to arrive at their second conclusion through an argument of four propositions; and the first proposition is the basis for all that follows. That proposition is, that while the indorsement "for collection" is unambiguous, in so far as it shows that it creates some kind of a bailment, but is ambiguous in that it does not show what kind of a bailment, and when the trust relation is to cease, etc., etc.; and then follows the argument, that as the defendant in error had it in its power by a fuller indorsement to show that the proceeds were to remain its property until received by it, it was negligence on the part of the defendant in error not to have made its indorsement fuller: and suggest that "in every day's business negotiable paper is indorsed "for collection and remittance to" and again that it might be properly indorsed "for collection and shipment of proceeds to;" and again, "apt words for this intention would be "for

collection, for remittance (or shipment of proceeds) to (name of the immediate indorsee) and for credit;" and then at page 44 says "the indorsement was simply 'for collection.'"

Now in point of fact the indorsement was not simply "for collection," but was "for collection for German-American National Bank of Peoria, Ill." And this indorsement of itself without more, means precisely what the forms suggested by counsel for defendant in error has put in words. This is fully demonstrated by the authorities hereinbefore cited and quoted from.

We respectfully submit that the judgment of the Circuit Court should be affirmed.

[redacted]

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IN THE

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THE OLD NATIONAL BANK OF EVANSVILLE, INDIANA, *Plaintiff in Error,* vs. THE GERMAN-AMERICAN NATIONAL BANK, OF PEORIA, ILLINOIS, *Defendant in Error.*	No. 85, October Term, 1894. (No. 381, October Term, 1893.)

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

REPLY BRIEF,

AND ANALYSIS OF AUTHORITIES REFERRED TO IN THE BRIEF IN BEHALF OF DEFENDANT IN ERROR.

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BY ALPHEUS H. SNOW.

Frank H. Smith, Printer, Indianapolis.

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REPLY BRIEF.

I.

THE SPECIAL FINDING IS NOT DEFECTIVE IN NOT CONTAINING AN EXPRESS FINDING THAT THE PLAINTIFF IN ERROR GAVE ABSOLUTE CREDIT ON ITS BOOKS TO THE FIDELITY BANK BEFORE THE INSOLVENCY OF THE FIDELITY BANK WAS DIS-

CLOSED. THIS IS NOT AN ULTIMATE FACT. THE ULTIMATE FACTS ON THIS POINT ARE, THAT, BEFORE THE INSOLVENCY OF THE FIDELITY BANK WAS DISCLOSED, THOSE ACTS WERE PERFORMED WHICH ESTABLISHED THE OBLIGATION OF PLAINTIFF IN ERROR TO GIVE ABSOLUTE CREDIT TO THE FIDELITY BANK. THESE FACTS ARE ALL EXPRESSLY FOUND.

In answer to the proposition of counsel for the defendant in error that the special finding is defective because it does not find the ultimate fact that the plaintiff in error gave absolute credit for the amount of the draft in suit, on its books, to the Fidelity Bank before the insolvency of the Fidelity Bank was disclosed, but only finds the evidence upon this subject, we submit that the giving of credit upon the books is not the ultimate fact, but that the ultimate facts upon this subject are, that the plaintiff in error was under a contract to give an absolute credit to the Fidelity Bank as soon as the paper was paid, or, at the farthest, as soon as it should receive notice of the payment of the paper, and of the credit of the proceeds to it by the First National Bank of Terre Haute; and that it did receive notice of such payment and credit before the insolvency of the Fidelity Bank was disclosed. The "credit" is not the physical fact of writing in a book. The "credit" is a *contract relationship* and exists the instant all the facts which by the terms of the contract are conditions precedent to the obligation to credit have occurred; and the ultimate facts to be found are the facts constituting the conditions precedent, which in this case are fully found. It is found that a contract existed between the First National Bank of Terre Haute (which received payment of the paper) and the plaintiff in error, requiring the First National Bank to give absolute credit

to the plaintiff in error for the amount of the paper the instant it was paid; and that a similar contract existed between the plaintiff in error and the Fidelity Bank. It is also found that, before the insolvency of the Fidelity Bank was disclosed, the First National Bank of Terre Haute received payment of the paper, and that it immediately mingled the proceeds of the paper with its own funds and gave credit on its books, for the amount of the paper, to the plaintiff in error. It is also found, (if this be a condition precedent to the existence of the "credit" by the plaintiff in error to the Fidelity Bank, which plaintiff in error does not admit,) that the plaintiff in error received notice of the payment of the paper and of the physical credit to it on the books of its indorsee bank, before the insolvency of the Fidelity Bank was disclosed.

(Record, pp. 20, 22, 23, 33, 34, 36, 37.)

The special finding, therefore, is not defective in the respect in which it is claimed, by counsel for defendant in error, to be defective.

II.

UNDER THE CIRCUMSTANCES ATTENDING THE MAKING OF THE SPECIAL FINDING IN THIS CASE, WHICH ARE SHOWN BY THE RECORD, THE SPECIAL FINDING SHOULD NOT BE TREATED AS DEFECTIVE BECAUSE IT FINDS THE EVIDENTIAL FACTS INSTEAD OF THE ULTIMATE FACTS, BUT SHOULD BE TREATED AS AN AGREED STATEMENT OF EVIDENTIAL FACTS. SO CONSIDERED, THE SPECIAL FINDING FINDS ALL THE EVIDENTIAL FACTS FROM WHICH THE INFERENCE FOLLOWS THAT THE PLAINTIFF IN ERROR ACTUALLY GAVE ABSOLUTE CREDIT ON ITS BOOKS TO THE FIDELITY BANK BEFORE THE INSOLVENCY OF THE FIDELITY BANK WAS DISCLOSED.

Inasmuch as in this case the witnesses were located at Peoria, Cincinnati, Evansville and Terre Haute, and inasmuch as the production in Court of the books of the respective banks would be attended with considerable expense and much inconvenience, and inasmuch as there was no question in the minds of counsel but that the written statement obtained from any of the banks, or from the receiver of the Fidelity Bank, would be entirely truthful, it was agreed that a statement of facts should be made up from such written statements, in answer to interrogatories of counsel. Such a statement of facts was prepared. It was then suggested by counsel for defendant in error that the record would be simplified if the Court should adopt the agreed statement of facts as its special finding of facts, and state its conclusions of law thereon, and that the unsuccessful party, by excepting to the conclusions of law, might raise all the questions which could be raised under the submission of an agreed case. To this we assented, on condition that the arrangement should be approved by the Court. The matter was presented to His Honor, Judge Woods, and he agreed to adopt the agreed statements of facts as his special finding of facts, provided the record should show that he was not responsible for the insertion of evidential facts rather than ultimate facts, or for the insertion of facts which, on his view of the case, were not material. To this counsel assented, and Judge Woods accordingly wrote the following certificate at the bottom of the special finding of facts, which appears on page 28 of the record:

"The foregoing finding was prepared by counsel and embraces matters not deemed material by the Court, but, being warranted by the evidence, they are inserted at the instance of counsel."

Both parties, therefore, have waived the right, in our opinion, to object to the special finding because it sets out the evidential facts instead of the ultimate facts, and, by the certificate of the trial judge in the record, the record shows that such agreement of waiver was made.

If this Court treats the special finding of facts as an agreed statement of evidential facts, which it really is, it will, it is submitted, hold that on the facts found the plaintiff in error did give credit on its books to the Fidelity Bank, before the insolvency of the Fidelity Bank was disclosed, for the amount of the draft, if the Court deems this to be a material fact.

The special finding shows:

1. That the insolvency of the Fidelity Bank was disclosed at nine o'clock A. M., on June 21, 1887.

(Record, pp. 25, 38.)

2. That the letter from the First National Bank of Terre Haute was received by plaintiff in error before nine o'clock A. M., on June 21, 1887.

(Record, pp. 23, 27.)

3. That the credit was entered on the books of the plaintiff in error as a part of the business of the previous day (June 20, 1887,) and as of the date of June 20, 1887. (Record, pp. 23, 37.)

4. That it was the practice of plaintiff in error to enter upon its books as of the date of the previous day all transactions occurring previous to banking hours.

(Record, pp. 23, 37.)

5. That the entry of credit made by plaintiff in error in favor of the Fidelity Bank was made "*in pursuance of said practice.*" (Record, pp. 23, 37.)

What this amounts to is undoubtedly a statement that the clerk of the plaintiff in error who entered the credit did not look at the clock, so as to be able to testify whether he entered it thirty minutes before nine o'clock, or one minute before nine o'clock, on June 21, 1887, but that he *infers* that he *must* have entered it before nine o'clock, because he received the letter of notification of credit before banking hours on June 21, 1887, and because he entered the credit in favor of the Fidelity Bank in conformity to the practice of the plaintiff in error with respect to all transactions occurring before the beginning of banking hours.

The only natural and proper inference from these facts is that plaintiff in error gave absolute credit on its books to the Fidelity Bank for the amount of the draft in question before the insolvency of the Fidelity Bank was disclosed.

III.

IF THE COURT, UNDER THE CIRCUMSTANCES ATTENDING THE MAKING OF THE SPECIAL FINDING IN THIS CASE, WILL TREAT IT AS SUBJECT TO THE TECHNICAL RULES APPLICABLE TO SPECIAL FINDINGS, THE FINDING IS DEFECTIVE AS TO A FACT, THE BURDEN OF PROOF AS TO WHICH IS UPON THE DEFENDANT IN ERROR, IN THAT IT FAILS TO FIND EXPRESSLY THAT PLAINTIFF IN ERROR EVER RECEIVED THE PROCEEDS OF THE DRAFT IN QUESTION, BUT FINDS MERELY THE EVIDENCE BEARING ON THIS FACT. IT IS THEREFORE THE DUTY OF THE COURT, BY THE SETTLED PRACTICE OF INDIANA, TO REVERSE THE JUDGMENT AND TO REMAND THE CASE WITH PERMISSION TO THE DEFENDANT IN ERROR TO MOVE FOR A NEW TRIAL IN THE COURT BELOW AND WITH INSTRUCTIONS TO THE COURT BELOW TO GRANT THE MOTION.

If the Court is to examine the special finding with a view to ascertain whether ultimate facts are found, the special finding is defective in a point with respect to which the burden of proof is upon the defendant in error, to-wit: with respect to the finding that the plaintiff in error ever received the money which defendant in error seeks to recover. Not only is the finding defective on this point, but it may even be claimed without impropriety that it finds that this fact does not exist.

The findings on this subject are as follows:

"*Twentieth.* Said draft was received by said First National Bank on Monday, June 20th, 1887, and was not entered upon its collection register and was paid to it by the Terre Haute Distilling Company between two and three o'clock of the afternoon of said day, and on said day, after payment, the amount thereof was credited to the said Old National Bank by the said First National Bank on its ledger account with the said Old National Bank, said credit being in accordance with the uniform practice, as above stated, of said First National Bank with respect to mercantile paper payable in Terre Haute and paid to it, received by it for collection from said Old National Bank, and which was a part of the regular and usual mutual and reciprocal collection business between said banks.

"*Twenty-first:* On the afternoon of said June 20th, 1887, a letter was written by the said First National Bank to the said Old National Bank, advising the latter of the payment and credit, which letter was posted at or about four o'clock of the same afternoon.

"*Twenty-second:* The first mail from Terre Haute to Evansville after the posting of said letter was scheduled to leave Terre Haute at 9:30 P. M. of the same day,

and to arrive at Evansville at about 1:30 A. M. of the next day. Said letter was delivered to the said Old National Bank at or about eight o'clock on the morning of June 21st, 1887.

"*Twenty-third:* During the month of June, 1887, the banking hours of the said Fidelity National Bank, the said Old National Bank, and the said First National Bank, were from nine o'clock in the forenoon continuously until three o'clock in the afternoon.

"*Twenty-fourth:* During the month of June, 1887, it was the practice, and for many years prior thereto had been the practice, of the said Old National Bank in entering upon its account books the date of each transaction, to enter those transactions as occurring upon the same day, which occurred between the beginning of banking hours upon one day and the beginning of banking hours on the next business day. *In pursuance of said practice*, the said letter having been received as aforesaid by the Old National Bank prior to the beginning of banking hours on the said 21st day of June, 1887, the amount of said draft was by the said Old National Bank entered in its account with the said Fidelity National Bank as a credit to the said Fidelity National Bank as of June 20th, 1887."

* * * * * * * * * *

"*Thirty-first.* No remittance of money or any tangible representative of money representing said draft was ever made by the said First National Bank to the said Old National Bank, or by the said Old National Bank to the said Fidelity National Bank, or by the said Fidelity National Bank or its receiver to the said German-American National Bank, and the proceeds of said draft never passed between said banks, if at all, other-

wise than by the debit and credit entries above mentioned.

"*Thirty-second.*" Prior to the institution of this suit, the said Old National Bank and the said First National Bank made a mutual settlement of their collection accounts up to and including the above mentioned entries representing said draft. The mutual collection accounts between the said Old National Bank and the said Fidelity National Bank, have not been settled on account of the insolvency of said Fidelity National Bank, but the said Old National Bank claims upon such settlement the benefit of the amount of said draft as a debit on its account with the said Fidelity National Bank." (Record, pp. 23, 25, 36, 37, 39.)

Plainly these findings are evidence merely, bearing on the ultimate fact that the plaintiff in error did, or did not, receive the proceeds of the draft from the First National Bank of Terre Haute before the insolvency of the Fidelity Bank was disclosed.

It is the settled practice in Indiana, that when a special finding is defective because it does not find an ultimate fact, the burden of proof of which is upon the successful party, but only finds the evidence tending to prove the ultimate fact, the judgment will be reversed, but that, inasmuch as the successful party in the Court below had no opportunity to move for a new trial, since the judgment of that Court was in his favor, the case will be remanded with permission to the successful party to move in the Court below for a *venire de novo* and for a new trial, and with instructions to the Court below to grant such new trial if moved for.

Parker v. *Hubble*, 75 Ind., 580.

Buchanan v. *Milligan*, 108 Ind., 433.

Western Union Telegraph Co. v. *Brown*, 108 Ind., 538.

Should the Court be of opinion, therefore, that the special finding in this case is to be treated as a true special finding instead of as an agreed statement of facts, it will, it is submitted, be the duty of the Court to reverse the judgment in favor of the defendant in error, but it may at the same time give the defendant in error permission to move in the Court below for a new trial and instruct that Court to grant the motion.

Analysis of Authorities Referred to in the Brief in Behalf of Defendant in Error.

IV.

AN ANALYSIS OF THE AUTHORITIES REFERRED TO IN THE BRIEF IN BEHALF OF DEFENDANT IN ERROR SHOWS THAT IN NONE OF THE CASES REFERRED TO WAS ANY QUESTION MADE AS TO WHETHER THE INDORSEMENT "FOR COLLECTION" WAS AMBIGUOUS AS TO THE DISPOSITION TO BE MADE OF THE PROCEEDS OF THE PAPER, AND THAT IN ONLY FIVE OUT OF THE THIRTY CASES REFERRED TO BY COUNSEL FOR DEFENDANT IN ERROR, COULD IT HAVE POSSIBLY MADE A DIFFERENCE IN THE DECISION OF THE CASES, HAD THE QUESTION BEEN RAISED, AND HAD SUCH AMBIGUITY BEEN DECIDED TO EXIST.

It has been shown by plaintiff in error, in its original brief, that the only rights which the owner of negotiable paper who has parted with it without consideration and merely for the purpose of collection has, as against a second or subsequent indorsee, are *property* rights, *i. e.*, rights arising from privity of estate in the

paper bailed for collection; the only *contract* rights of the owner, under such circumstances, being with his immediate indorsee. This is the doctrine of this Court, as announced in *Hoover* v. *Wise*, 91 U. S., 308.

It is evident that in a suit involving the rights of a second indorsee bank, where the owner of the paper has parted with it without consideration, and merely for the purpose of having it collected (either indorsing it, "for collection," or absolutely), the second indorsee bank, if it admits that it has received the proceeds of the paper, or a credit equal to the amount of the proceeds, must defend against the owner, who, upon the insolvency of the first indorsee bank, seeks to enforce his property rights in the paper or its proceeds, upon one of the two following grounds of defense:

First. The second indorsee bank may plead that the contract made between the owner and the first indorsee bank, in so far as it was a contract of agency or bailment, was *fully performed* by the first indorsee bank, by itself, or by a subsequent indorsee bank in behalf of the first indorsee bank, before the insolvency of the first indorsee bank was disclosed, whereby the owner's property rights in the paper and its proceeds were lost by substitution of a purely contractual (debit) obligation of the first indorsee bank toward the owner, in lieu of its obligation concerning the property.

Second. The second indorsee bank may plead that by reason of some representation made by the owner (or some ambiguous statement made by him, having the presumptive meaning of a representation), to the effect that he is not the owner of the paper or its proceeds, or that he proposes to relinquish his ownership in the paper or its proceeds upon a contingency which has

occurred, and by reason of its having acted to its detriment on the faith of such representation, the owner is *estopped* to claim that he has any property rights in the paper or its proceeds.

The question whether the indorsement or transfer "for collection" is ambiguous as to the disposition which is to be made of the proceeds,—that is, whether the words "for collection" have a different presumptive meaning when the indorsement or transfer is to a bank from that which they have when the indorsement or transfer is to private person, in so far as the disposition of the proceeds is concerned, has an important bearing upon these defences.

If such ambiguity exists, and if a bank which receives paper indorsed "for collection" presumptively has the right to take the proceeds and debit itself to the owner, it follows that every subsequent indorsee bank is entitled to assume that the first indorsee bank has this right and that each of its previous indorsee banks has the same right as between itself and its immediate indorser bank. It follows also that each subsequent indorsee is entitled to assume, when the first indorsee "for collection" is a bank, that the owner's purpose is that the proceeds shall not be kept intact, but that, the instant they exist in the hands of any indorsee bank by payment of the paper to it, he desires to have that bank destroy their identity and substitute a credit for them in favor of the indorser bank, since only in this way can the owner avoid the expense and risk of transportation, and since only in this way can banks do collection business at a low cost.

If the various indorsee banks have such a right to rely upon this presumptive meaning of the words, "for

collection," when the indorsees are all banks, it follows that the credit of the amount of the proceeds by the indorsee bank which receives payment of the paper, to its next previous indorser bank, is *rightful*.

But the contract between the owner and the first indorsee bank is performed when the identity of the specific proceeds is *rightfully* destroyed and a credit substituted therefor, and the obligation of the first indorsee bank to credit the owner arises at that same instant.

Hence it appears that, in determining whether an entry of credit by a subsequent indorsee bank to its immediate indorser bank constitutes a performance of the contract between the owner and his first indorsee bank "for collection," it is important to ascertain whether the indorsement "for collection" is or is not ambiguous in so far as it relates to the disposition of the proceeds.

How this ambiguity and presumptive meaning of the indorsement "for collection" bears upon a defence of estoppel, interposed by the second indorsee against the owner, has been fully shown in the original brief.

All the cases which hold that an indorsement which is absolute in its terms but really for collection, presumptively transfers the title of the owner to both the paper and its proceeds, so as to permit a transferee from the indorsee, who makes advances on the faith of the indorsee, to hold as a purchaser for value or by estoppel, are authorities in favor of the contention of plaintiff in error, that the expression, "for collection," is ambiguous as to the disposition of the proceeds, so far as they have any bearing upon its contention. Such cases are the following:

Bank of Metropolis v. *New England Bank*, 1 How., 234; 6 How., 212.

Wilson v. *Smith*, 3 How., 763.
Sweeny v. *Easter*, 1 Wall., 116.
First National Bank v. *Gregg*, 79 Pa. St., 384.
Hackett v. *Reynolds*, 114 Pa. St., 328.
Claflin v. *Wilson*, 51 Iowa, 15.
Freeman's National Bank v. *National Tube Works*, 151 Mass., 413.

The underlying principle of these cases is that whenever the owner of paper transfers it without consideration, and merely for the purpose of collection, he must clearly indorse the terms of the trust which he imposes on the property, and that if he fails to do this, subsequent indorsees are entitled to treat the indorsement as meaning that which it presumptively means.

The cases in which the rights of a drawer of a draft against the indorsee, "for collection," are involved, fall within the same principle as the cases where the rights of an owner who has indorsed absolutely, against the second indorsee, are concerned. The right of the drawer against the payee, when the payee has given no consideration to the drawer, is almost of the same nature as the right of an indorser, who indorses absolutely, but who has received no consideration from his indorsee.

Such a case is the following:

Carroll v. *Exchange Bank*, 30 W. Va., 518.

In this case, the drawer of a draft sued the indorsee, "for collection," of the payee, to recover the proceeds of the draft, on the ground that no consideration had passed from the payee to him. The indorsee defended on the ground that it was a purchaser for value of the paper and its proceeds, without notice of the drawer's rights, and the Court sustained the defence.

The cases referred to by counsel for defendant in

error in which it appears that the paper had not been paid before suit was brought, and in which therefore no question could have been raised as to the right to the proceeds of the paper, are plainly not authorities against the contention of plaintiff in error,—which is that the expression "for collection" contains an ambiguity in so far only as the disposition of the proceeds is concerned. Until the paper is paid, no question as to the disposition of the proceeds can arise.

Such cases are the following:

White v. *National Bank*, 102 U. S., 658.

Third National Bank v. *Clark*, 23 Minn., 263.

In these cases, the paper not having been paid, the indorsee "for collection" sued the indorser on the indorsement and offered evidence to show that the restrictive indorsement was intended to be absolute. The Court held such evidence inadmissible because it contradicted the indorsement.

Such cases also are the following:

Lee & Co. v. *Chillicothe Branch Bank*, 1 Bond, 387.

Leary v. *Blanchard*, 48 Maine, 269.

In these cases the indorsee of a note "for account of" the payee sued the maker, the note not having been paid. The Court held that the indorsee, under this restricted indorsement, took the paper subject to all the defences existing between the maker and the payee.

Those cases in which the paper in suit is indorsed "for collection" to a private person and which, therefore, do not involve the right of *bankers* as indorsers and indorsees "for collection," plainly are not authorities against the contention of plaintiff in error. In this class of cases even when the suit involves the right to the

proceeds of the paper, the presumptive meaning of the indorsement "for collection" to a private person is that he shall transmit to the indorser the identical specific moneys received by him in payment of the paper, and all subsequent indorsees are charged with notice of this presumptive meaning and cannot, as against the owner of the paper, rightfully destroy the identity of the proceeds and substitute a book-credit therefor.

Such cases are the following:

Treuttel v. *Barandon*, 8 Taunton, 100.

Sigourney v. *Lloyd*, 8 Barnewall and Cresswell, 622.

In these cases a private person to whom the paper had been indorsed "for account of" the owner pledged the paper, with this indorsement upon it, for advances, and the pledgee sought to defend against the owner on the ground that he was a purchaser for value without notice. The Court held the defence not good.

The cases which hold that, even when the indorsement "for collection" is to a bank, and that even when a contract exists between indorser and indorsee that the indorsee shall credit the proceeds to the account of the indorser, this obligation to credit the proceeds, (and even all right to credit the proceeds) on the part of the indorsee and all subsequent indorsees ceases when the insolvency of the first indorsee is disclosed, if the paper has not been previously paid in cash and the proceeds credited, are not authorities against the contention of plaintiff in error. The instant that a bank ceases to be a bank and the fact of this cessation is publicly disclosed, all the presumptive meaning of the indorsement "for collection" which existed when the indorsement was to a bank ceases, and the same presumptive meaning at-

taches as attaches to an indorsement "for collection" to a private person. Moreover, the instant that a bank ceases to be a bank, and the fact of such cessation is publicly disclosed, the contract that it will credit the proceeds, inasmuch as it includes a *license* or authority to credit, which license the owner conferred upon his indorsee *as a solvent bank*, and not as an insolvent private person, is annulled by operation of law, in accordance with the presumed intention of the parties.

Such cases are the following:

National Butchers' and Drovers' Bank v. *Hubbell*, 117 N. Y., 284.

First National Bank v. *Armstrong, Receiver*, 36 Fed. R., 59.

Fifth National Bank v. *Armstrong, Receiver*, 40 Fed. R., 46.

Levi v. *National Bank*, 5 Dillon, 104.

First National Bank v. *Reno County Bank*, 3 Fed. R., 257.

Bank of Metropolis v. *First National Bank*, 19 Fed. R., 301 (*semble*).

Cecil Bank v. *Farmers' Bank*, 22 Md., 148.

Blaine v. *Bourne*, 11 R. I., 119 (*semble*).

First National Bank of Crown Point v. *First National Bank of Richmond*, 76 Ind., 561.

City Bank of Sherman v. *Weiss*, 67 Texas, 331 (second part).

Manufacturers' National Bank v. *Continental Bank*, 148 Mass., 553.

Sutherland v. *First National Bank*, 31 Mich., 230.

These cases are, rather, authorities in favor of the contention of plaintiff in error, that an ambiguity as to the disposition of the proceeds exists in the expression,

"for collection," since they recognize that the words, "for collection," *change* in their meaning the instant that the insolvency of the first indorsee bank is disclosed, provided the paper has not been then paid in cash and the identity of the proceeds destroyed and credit given for the amount thereof.

The following five cases, referred to by counsel for defendant in error, remain to be considered:

Commercial National Bank v. *Armstrong, Receiver*, 148 U. S., 50.

In re Armstrong, Receiver, 33 Fed. R., 405.

Armstrong, Receiver v. *National Bank of Boyertown*, 90 Ky., 431.

First National Bank of Circleville v. *Bank of Monroe*, 33 Fed. R., 408.

City Bank of Sherman v. *Weiss*, 67 Texas, 331, (first part.)

In these five cases, on the facts, the question as to whether an ambiguity exists in the expression "for collection" in so far as it relates to the disposition of the proceeds, might have been raised; and if such ambiguity had been decided to exist, it might possibly have affected the decision in these cases or the grounds upon which the decisions are placed.

V.

OF THE FIVE CASES IN WHICH THE QUESTION AS TO WHETHER AN AMBIGUITY EXISTS MIGHT POSSIBLY HAVE BEEN RAISED AND DECIDED AND MIGHT POSSIBLY HAVE AFFECTED THE DECISION OR THE GROUNDS OF DECISION, TWO PRESENT EXACTLY THE SAME FACTS AS ARE PRESENTED IN THE FIRST PART OF THE CASE OF COMMERCIAL NATIONAL BANK V. ARMSTRONG, RECEIVER, 148 U. S., 50, AND WERE DECIDED IN

THE SAME WAY; TWO PRESENT SUBSTANTIALLY THE SAME FACTS AS WERE PRESENTED IN THE SECOND PART OF THE CASE OF COMMERCIAL NATIONAL BANK V. ARMSTRONG, RECEIVER, BUT WERE DECIDED EXACTLY THE OPPOSITE WAY; AND THE FIFTH IS THE CASE OF COMMERCIAL NATIONAL BANK V. ARMSTRONG, RECEIVER;—SO THAT UPON THAT CASE BOTH PLAINTIFF IN ERROR AND DEFENDANT IN ERROR REALLY RELY. BY THE EXPRESS DECISION AND THE NECESSARY LOGIC OF THAT CASE AND OTHER CASES DECIDED BY THIS COURT, PLAINTIFF IN ERROR IS ENTITLED TO A REVERSAL OF THE JUDGMENT IN THIS CASE, WHATEVER VIEW MAY BE TAKEN BY THE COURT AS TO THE DISPUTED FINDINGS OF FACT.

In the cases of *Commercial National Bank* v. *Armstrong, Receiver*, 148 U. S., 50 (first part); *In re Armstrong, Receiver*, 33 Fed. R., 405, and *Armstrong, Receiver* v. *National Bank of Boyertown*, 90 Ky., 431, the second indorsee bank, "for collection," was not claiming any rights whatever. The second indorsee bank had placed in the hands of the receiver of the first indorsee bank, or in the hands of the Court, an amount of money equal to the amount of the proceeds of the paper which was the subject of the litigation, and had withdrawn from the contest. In the cases of *Commercial National Bank* v. *Armstrong, Receiver*, 148 U. S., 50 (first part), and *In re Armstrong, Receiver*, 33 Fed. R., 405, the money had been paid by the second indorsee bank to the receiver of the first indorsee bank. In the case of *Armstrong, Receiver* v. *National Bank of Boyertown*, 90 Ky., 431, the money had been paid into court by the second indorsee bank, in an interpleader suit.

Each of these cases was a suit in equity,—the first a suit against the receiver of the first indorsee bank to have a trust in favor of the owner decreed and enforced,

and to establish an equitable lien in its favor upon all the funds in the hands of the receiver,—the second an application by the receiver, in the receivership suit, for instructions as to whether a trust and equitable lien against the funds in his hands, in favor of the owner, existed,—the third an interpleader suit, brought by the second indorsee bank, against the owner and the receiver of the first indorsee bank "for collection," requiring them to interplead as to their right to an amount of money equal to the proceeds of the paper involved, which had been paid into court by the second indorsee bank.

In each of these cases, the claim in behalf of the first indorsee bank, made by its receiver after its insolvency, was necessarily based upon the claim that the contract of the first indorsee bank with the owner was performed before the insolvency of the first indorsee bank was disclosed. No other defence could possibly avail the receiver.

For the receiver to allege that the second indorsee bank became a purchaser *of the paper* for value, without notice, before the insolvency of the first indorsee bank was disclosed, would be to admit that the first indorsee bank, before its insolvency, became forever incapacitated to perform its contract to present the paper as the property of the owner and to receive payment thereon, and that the contract was finally broken before the insolvency of the first indorsee bank was disclosed.

For the receiver to allege that the second indorsee bank became the owner *of the proceeds* by estoppel would be in effect to allege that, before the insolvency of the first indorsee bank "for collection" was disclosed, it had become forever incapacitated to perform its con-

tract to give credit for the proceeds, since the defence of estoppel interposed by the second indorsee bank would necessarily be based upon its contract with the first indorsee bank and its instructions from the first indorsee bank, on which, though *ex hypothesi* unauthorized and wrongful, it would claim to be permitted to rely on account of the negligence of the owner in indorsing in ambiguous language. An act unauthorized by the owner, and wrongful as to him, could, of course, constitute only a breach of contract—not a performance of it.

Accordingly, the defences or claims interposed by the receiver of the first indorsee bank in each of the above three cases were discussed and judged as defences or claims that the first indorsee bank fully performed its contract before its insolvency was disclosed.

This Court, in the case of *Commercial National Bank* v. *Armstrong, Receiver*, 148 U. S., 50, (first part,) held that the receiver of the first indorsee bank could not defend on the ground that the first indorsee bank had performed its contract with the owner before the insolvency of the first indorsee bank was disclosed, as against the owner who sought to have a trust declared in its favor and secured by a lien on all the funds in the hands of the receiver. But there the fact that the second indorsee bank had received payment of the paper and had mingled the proceeds with its own funds and had given credit to the first indorsee bank therefor, was offset by the consideration that *the second indorsee bank was not before the Court claiming that such acts on its part constituted a performance of the contract between the owner and the first indorsee bank*, but that, on the contrary, it had taken from its moneys a sum exactly equal to

the proceeds of the paper and placed this sum in the hands of the receiver of the insolvent first indorsee bank, so that the Court was perhaps authorized not to regard the legal rights of the parties, but to treat them merely as having conflicting equities in *a fund* in the hands of the Court,—exactly as if the second indorsee bank had, from the instant the paper was paid, kept in a package the identical moneys received, and, after the failure of the first indorsee bank, had handed the package to the receiver.

The cases of *In re Armstrong, Receiver*, 33 Fed. R., 405, and *Armstrong, Receiver* v. *National Bank of Boyertown*, 90 Ky., 431, may also be distinguished from the case at bar upon the same ground.

In the cases of *Commercial National Bank* v. *Armstrong, Receiver*, 148 U. S., 50 (second part,) the second indorsee banks were not before the Court claiming any rights as to the proceeds, but it appeared that, though they were not parties to the litigation, they were claiming the right to hold the proceeds in return for value given (credit extended) to the first indorsee bank on the faith that they should take the proceeds and give credit therefor to the first indorsee bank. The receiver of the first indorsee bank claimed that such crediting of the proceeds, before the insolvency of the Fidelity Bank was disclosed, constituted a performance of the contract between the owner and the first indorsee bank. This Court sustained the receiver's defence, from which the necessary inference is that, had the second indorsee banks been parties to the litigation and made the same defence which the receiver of the first indorsee bank made, this Court would have equally sustained their defence.

In the cases of *First National Bank of Circleville* v. *Bank of Monroe*, 33 Fed. R., 408, and *City Bank of Sherman* v. *Weiss*, 67 Texas, 331 (first part,) the second indorsee bank was actually before the Court as a party defendant, claiming the right to hold the proceeds as against the owner, which had indorsed "for collection" to its correspondent bank with which it had a debit and credit account,—in the one case with instructions that the paper was "for credit," and in the other with an indorsement that the paper was "for collection and credit." In both of these cases the second indorsee bank had given value (extended credit) to the first indorsee bank on the faith that it should have the proceeds and become indebted therefor to the first indorsee bank, and had received payment of the paper and given credit to the first indorsee bank, before the insolvency of the first indorsee bank was disclosed. The Court refused to sustain the defence.

These two cases are, therefore, exactly opposed to the doctrine of this Court, as declared in the case of *Commercial National Bank* v. *Armstrong, Receiver*, 148 U. S., 50, (second part,) and need not be considered further.

If the second indorsee banks had been parties to the litigation in the first part of the case of *Commercial National Bank* v. *Armstrong, Receiver*, 148 U. S., 50, and had they been before the Court claiming the right to pay the amount of the proceeds to the receiver *in satisfaction of their indebtedness to the receiver*, and defending against the owner on the ground that the contract between the owner and the first indorsee bank was fully performed when the second indorsee banks, before the insolvency of the first indorsee bank was disclosed, took

the proceeds of the paper and mingled them with their funds and gave the first indorsee bank credit therefor, it seems to us not impossible that this Court would have held that such credit was rightful, and that by such credit the contract between the Commercial National Bank (the owner of the paper) and the Fidelity Bank (the first indorsee bank "for collection") was fully performed.

Had the second indorsee banks been parties to that litigation, and had the Court taken the above view of their acts, in the first part of that case, the decision of the second part of the case would have been the same, because if a credit given by the second indorsee banks to the first indorsee bank, not against advances and not for value received, constituted a performance of the contract between the owner and the first indorsee bank, then *a fortiori*, a similar credit given against advances and for value received would constitute a performance.

But, if the Court is of opinion that the act of the second or subsequent indorsee bank in crediting its next previous indorsee bank when the credit is not against value given, can never constitute a performance of the contract between the owner and the first indorsee bank "for collection," (even when the owner, as in this case, has made a side contract with the first indorsee "for collection" that the paper shall be credited *when paid*) the Court should, we submit, nevertheless reverse the judgment in this case on the authority of the second part of the case of *Commercial National Bank* v. *Armstrong, Receiver*, 148 U. S., 50. Every material fact which existed in that case exists, as we claim, in this. If so, as that case was decided, so must this be, and it is immaterial to plaintiff in error whether that

decision, upon reconsideration, shall be sustained upon the ground that the credit by the second indorsee banks against value previously given was rightful as to the owner, and constituted a *performance* of the contract between the owner and its first indorsee bank, or upon the ground that such credit was wrongful as to the owner, but that by reason of its negligence in indorsing ambiguously, it is *estopped* to claim as owner, because its equities are less than those of the indorsee banks which took the paper and received payment of it, understanding that the proceeds should be treated as all moneys coming into the hands of bankers are presumptively to be treated, and which gave value to their immediate indorsers, on the faith that they might so deal with the proceeds.

But counsel for defendant in error claim that one of the facts which existed in the second part of that case does not exist in this, to-wit: The fact that the second indorsee bank gave absolute credit, on its books, to the Fidelity Bank before the insolvency of the Fidelity Bank was disclosed. We deny the materiality of the fact of credit *on the books* and say that the existence of the *obligation*, on the part of plaintiff in error, *to credit* the Fidelity Bank is the ultimate and material fact, and that all the material facts are found showing that the *obligation* of plaintiff in error to credit the Fidelity Bank was complete before its insolvency. But further, we deny the claim of counsel for the defendant in error that this fact that plaintiff in error gave credit, on its books, to the Fidelity Bank before the insolvency of the Fidelity Bank was disclosed, does not exist in this case, and say that facts are found from which the only inference is that the plaintiff in error did give

absolute credit on its books, to the Fidelity Bank, for the amount of the proceeds of the draft in question, before the insolvency of the Fidelity Bank was disclosed; and that inasmuch as the special finding in this case is really an agreed statement of facts, and this is shown by the record, it is the duty of the Court to make this inference.

In answer to the claim of counsel for defendant in error that the special finding is to be judged by the technical rules applicable to special findings and not by the rules applicable to agreed statements of fact, we submit that, so treated, the first fault in the special finding is with respect to a fact which is material to the case of defendant in error and as to which it has the burden of proof,—the fact that the plaintiff in error received the proceeds of the paper in question—as to which the special finding states only the evidence. If this position be correct, it will be the duty of the Court to reverse the judgment in this case with permission to defendant in error to move for a new trial and with instructions to the Court below to grant the motion.

But if the Court should be of opinion that the special finding is defective only as it concerns the finding as to whether the plaintiff in error gave credit to the Fidelity Bank before the insolvency of the Fidelity Bank was disclosed (which we do not deem at all probable,) it will be necessary for the Court to examine as to whether the contract between the defendant in error and the Fidelity Bank was not performed, and the trust imposed by the defendant in error on the paper and its proceeds accomplished and terminated, the instant the First National Bank of Terre Haute received payment of the paper and credited the amount of the proceeds

to the plaintiff in error. It is upon this last phase of the case that our contention that an ambiguity exists in the expression "for collection" chiefly bears.

Unless the first part of the case of *Commercial National Bank* v. *Armstrong, Receiver*, is to be explained in the manner above suggested our best reasoning upon the matter requires us to dissent from its conclusions. If this Court intended to hold, in that part of the case, that in a contest between the owner who had indorsed "for collection" to a bank with instructions to credit the proceeds when paid, and a second or subsequent indorsee bank, the contract obligation of the first indorsee bank would not be held to be performed when the second or subsequent indorsee bank received payment and credited the amount of the proceeds to its immediate indorser bank, during the solvency of all the parties to the paper, with the greatest respect for the Honorable Court, we think that it would have been in accordance with the intention of all parties concerned, if the Court had treated the owner of the paper as having by its indorsement to a bank, merely with the words, "for collection," used ambiguous language to express its intention as to the disposition of the proceeds and as having signified its presumptive intention to all the world to give up all right to the proceeds from the instant the paper was paid, and as having, by its side-contract with its indorsee bank, with which it had a debit and credit account, that the paper *should be credited when paid*, forever precluded itself in any Court from saying that the presumptive meaning of its indorsement was not its absolute and fixed meaning, so as to require the owner to look only to its first indorsee the instant the paper was paid. Such a decision would not

have placed bankers, who do collection business by a system of debit and credit, which is the cheapest and best system for the owner, and of immense service to the financial world, on the basis of wrongdoers, at the option of the owner. Yet, we respectfully and earnestly submit, this is exactly what the decision in the first part of the case of *Commercial National Bank* v. *Armstrong, Receiver*, by necessary implication, holds, unless it can be distinguished as above suggested. If the credit of the proceeds by the second indorsee bank to the first indorsee bank is rightful as to the owner, the contract of the first indorsee bank to the owner is performed by that credit, and the obligation of the first indorsee bank to credit instantly exists. If such credit is wrongful as to the owner, it is not a performance. If the Court holds such credit not to be a performance, it will, by necessary implication hold such credit to be wrongful as to the owner,—thus characterizing as wrongful, transactions, millions of which occur every day all over the world, and which must occur unless the whole financial system is revolutionized.

We are loth to believe that the Court intended to hold, in the first part of the case of *Commercial National Bank* v. *Armstrong, Receiver*, that the credit given by the second indorsee bank to the first indorsee bank was wrongful, because such a construction would seem to put the two parts of the case in conflict with one another. In the second part of the case, the Court plainly held that the same credit, *made against value previously given on the faith of the proceeds*, was rightful and constituted a performance of the first indorsee bank's contract with the owner. That an act which was otherwise wrongful as against the owner could

become rightful as against him by reason of acts done (value obtained) by a party not authorized by him to do the acts, which acts are, *ex hypothesi*, against the owner's interest, seems impossible.

The fact that the words "for collection" have a different presumptive meaning when the indorsement is to a banker from that which they have when the indorsement is to a private person, has often been recognized by this Court, notably in the case of *Marine Bank* v. *Fulton Bank*, 2 Wall., 252, but it seems never to have been announced by any court that such a statement amounts to saying that an ambiguity exists in the words "for collection," in so far as they relate to the disposition of the proceeds of the paper.

Once grant that such ambiguity exists, and the owner of the paper who indorses to a bank "for collection" is found not to be faultless. His rights are not to be protected at the expense of the rights of banks which receive the proceeds, but are only qualified rights. The burden is upon him to point out the identical proceeds, not upon subsequent indorsee banks to show that their book credits are not the proceeds. The presumption is that a subsequent indorsee bank which mingles the proceeds with its own moneys and substitutes a credit therefor, does so rightfully as against the negligent owner, and that such act constitutes a performance of the trust and of the owner's contract with his indorsee bank "for collection," and is not the commission of a tort.

We earnestly ask the Court, therefore, in case it should be of opinion that this case is not wholly governed by the second part of the case of *Commercial National Bank* v. *Armstrong, Receiver*, so as to require a

reversal of the judgment on the authority of that case, to consider the bearing of our suggestion that an indorsement "for collection" is ambiguous, in so far as it relates to the disposition of the proceeds, and that its presumptive meaning, when the indorsement is to a bank, and that bank and its indorsee banks are solvent, is, that the identity of the proceeds shall be destroyed and a credit substituted therefor at the earliest possible instant,—believing that the necessary logical result from the acceptance of this suggestion will be that this Court will hold that the act of the First National Bank of Terre Haute in destroying the identity of the proceeds of the draft in question at the instant they existed as such by payment of the paper was rightful, and constituted a performance of the trust imposed by the defendant in error on the draft in question and its proceeds, and of the contract between the defendant in error and the Fidelity Bank, and will thus prevent a stigma from being placed by the Courts upon many of the necessary acts of bankers in the course of their collection business; and that this Court will reverse the judgment of the Court below in this case.

VI.

THIS SUIT SHOULD HAVE BEEN BROUGHT IN EQUITY AND NOT AT LAW. THE COURT BELOW, IN ITS CONCLUSIONS OF LAW THAT THE LAW OF THE CASE WAS WITH THE DEFENDANT IN ERROR AND THAT IT WAS ENTITLED TO JUDGMENT FOR THE AMOUNT OF THE DRAFT, BY NECESSARY IMPLICATION HELD THE SUIT TO HAVE BEEN PROPERLY BROUGHT ON THE LAW SIDE OF THE COURT. IN SO HOLDING, THE COURT BELOW ERRED.

From the decisions of this Court it is clear that

the remedy of defendant in error should have been sought at equity instead of at law.

National Bank v. *Insurance Company*, 104 U. S., 54.

Union Stock Yards v. *Gillespie*, 137 U. S., 411.

It is also held that such an objection is jurisdictional and is not waived even by a submission on an agreed statement of facts.

Willard v. *Wood*, 135 U. S., 309.

This objection to the judgment is undoubtedly raised by the assignment of error in this case, that the Court below erred in its conclusions of law that on the facts specially found the law of the case was with the defendant in error, and that on the facts specially found the defendant in error was entitled to judgment for the amount of the draft in question. (Record p. 44.)

The judgment should be reversed on this ground.

For the reasons above stated, in addition to those stated in the original brief, plaintiff in error asks that the judgment of the Court below be reversed.

Respectfully submitted,

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JOHN M. BUTLER,
Of Counsel.

Indianapolis, Indiana, November 8, 1894.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

THE OLD NATIONAL BANK OF EVANSVILLE, INDIANA,
vs.
THE GERMAN-AMERICAN NATIONAL BANK OF PEORIA, ILLINOIS.

No. 85,
October Term,
1894.

RESPONSE OF DEFENDANT IN ERROR TO REPLY BRIEF OF PLAINTIFF IN ERROR.

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Counsel for appellee beg space for a few words to respond to some of the propositions advanced by counsel for appellant in their reply.

First. As to their first proposition, they attempt a new assignment. In their original brief the whole force of their argument was that the court below found as a fact that the plaintiff in error had actually given credit on its books to the Fidelity before insolvency was disclosed, and thereby undertook to bring the case within their construction of Commercial National Bank *v.* Armstrong, 148 U. S. 50. By their new assignment they say that it is immaterial whether that fact is found or not, for the reason that the facts are found, out of which it became the duty of the plaintiff in error to have made such credit before insolvency was disclosed.

This new proposition requires a new casting of their entire argument, and does not bring the case within the let-

ter, at least, of the case relied upon. Nor do we think that it brings the present cause within the principle thereof.

On the contrary, we think the relation of principal and agent has not ended, and that of debtor and creditor begun, until the collecting bank had for itself done every act, which, upon its part was necessary to signify its intention to substitute for the relation of principal and agent its "unqualified obligation as a debtor;" that until its obligation as such is complete and irrevocable, "it remained an agent merely."

Bank of Circleville *v.* Bank of Monroe, 33 Fed. 408.

Second. In their second proposition, counsel have gone one step beyond their original brief. Then they thought that they could by parol evidence explain the endorsement "for collection and credit," on the ground that they thought that such endorsement was ambiguous. They have now gone much farther and propose, by parol, to enlarge and modify the record in this cause.

Certainly nothing is better settled than that the record must be taken as speaking the exact literal truth. The record shows the waiving of the jury by proper stipulation, submission of cause for trial, finding and judgment, the request of defendant (now plaintiff in error) for a special finding of facts, with court's conclusion of law, the hearing of evidence, etc. Trans. p. 24.

Yet counsel say in the face of the record, that no evidence was heard, an agreed statement of evidentiary facts was submitted to the court, upon which the case was determined. Such a statement can not for a moment be tolerated.

The statute of Indiana provides for submitting causes upon an agreed statement of facts. If such had been the intention of the parties, they doubtless would have followed the statute, which provides a very different procedure.

They cite, as showing that the matter is as they state, the following sentence added by his Honor Judge Woods

at the foot of the special finding as drafted by counsel: "The foregoing finding was prepared by counsel, and embraces matters not demeed material by the court, but *being warranted by the evidence*, they are inserted at the instance of counsel."

So far from this sentence supporting the gentlemen in their contention, its force is directly otherwise, for by its very terms it implies that evidence was heard. It is true that it shows that the draft of the special finding was prepared by counsel, but we suppose that your Honors have knowledge that such course is by no means unusual.

The special finding of facts in the record must be considered as such, and be governed by the rules applicable to such findings. And this being done, as shown in our original brief, and as virtually conceded by plaintiff in error, there is no finding of fact that the entry of credit for the item in controversy in the books of the plaintiff in error was made before nine o'clock on the morning of June 21. This fact may or may not be material; but so it is.

Third. In their third proposition, counsel for plaintiff in error, contend that taking the findings strictly as findings of fact by a court, then that it is deficient in that there is no finding of fact that the plaintiff in error ever received the money, to recover which this suit is brought.

Counsel have set out the findings touching this question both affirmatively and negatively, fully and specifically. Whether from these facts, thus fully and specifically found, it shall be considered that the money, for which suit is brought, came into the hands of the plaintiff in error, is a pure question of law. We did not ask the court to infer one fact from other facts found, as did the gentlemen upon the other side—we simply submitted to the court what is the proper legal inference from the facts found.

As to the fourth and fifth points, which consist of a review of the authorities cited by us in our original argument, as to whether or not an indorsement "for collection" or "for collection and credit" was ambiguous, an examin-

ation of the authorities will disclose their weight and force in this discussion, and we shall not consume the time of the court by going over them again.

Fourth. As to the sixth proposition, that this action should have been brought on the chancery side of the court.

This point is now presented for the first time, but as it goes to the question of jurisdiction of the court in which the suit is brought, it can be raised at any time. The only reason for remarking upon its being raised at this late date in the history of the case, is that evidently counsel for appellant have not had confidence in their present position, or it would have been made much earlier.

But why is this action not maintainable at law? What stands in the way? Counsel for plaintiff in error very correctly stated, in the opening sentence of his original brief, that it was an action for money had and received. In such an action no privity is required; while strictly an action at common law it has many resemblances to a suit in equity.

From an early period in the history of English jurisprudence, this form of action has been recognized as the proper remedy in such cases as the one at bar. "The action of *assumpsit* for money had and received, it is said by Lord Mansfield, Burr. Moses *v.* Macferlan, will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in Stratton *v.* Ratsall, 2 T. R. 370: That this action has been of late years extended on the principle of its being considered like a bill in equity. And therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and could recover in a court of equity." Daniels, J., in Cary *v.* Curtis, 3 How., pp. 246–7.

Mr. Wait in his "Actions and Defenses," Vol. IV, p. 469, says: "An action of assumpsit for money had and received is an equitable remedy that lies in favor of one person

against another, when that other person has received money either from the plaintiff himself or third persons, under such circumstances, that in equity and good conscience, he ought not to retain the same, and which, *ex æquo et bono*, belongs to the plaintiff."

Citing a large number of authorities.

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"It is not, however, essential that any privity of contract should be shown; the plaintiff's right to the money is established, and the defendant is shown to have received it under such circumstances that he ought not to retain it, the law implies a promise to pay it to the party who ought to have it." *Idem.*

"The action is assumpsit for money had and received by the defendant to the plaintiff's use. And for money paid by the plaintiff for the defendant's benefit. This is often called an equitable action and is less restricted and fettered by technicalities and formalities than any other form of action. It aims at the absolute justice of the case, and looks solely to the inquiry whether the defendant holds money, which *ex æquo et bono* belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action; and, indeed, has many of the advantages without the artificial formalities and dilatory proceedings of a chancery suit."

Claflin *v.* Godfrey, 21 Pick. p. 6.

See, also:

Calland *v.* Lloyd, *et al.*, 6 M. & W. p. 25.

Gaines *v.* Miller, 111 U. S. p. 395.

Where under an action for money had and received at

law, the judgment would be an exact equivalent of a decree in equity under a bill filed, setting up substantially the same facts, the remedy is at law and not in equity. Miller J., in Litchfield *v.* Ballou, *et al.*, 114 U. S., p. 192.

There are exceptions to this general proposition, as, for instance, if the action would require an accounting which is peculiarly a subject of equitable jurisdiction; or where the plaintiff's title to the money sought to be recovered is equitable, and not legal. And such were the cases of

National Bank *v.* Insurance Co., 104 U. S. 54.

Union Stock Yards *v.* Gillespie, 137 U. S. 411.

And this consideration, *i. e.*, that the plaintiff's title to the money was equitable and not legal, was the very foundation of the decision in the last named case, which clearly recognizes the general doctrine: "We are met with the proposition that equity ought not to interfere where the law furnishes a remedy; that when a bank has money in its possession, which in fact belongs to a third party, received from whatsoever source it may be, an action at law will lie; and that, therefore, no case for equitable cognizance is presented. But this latter proposition has some limitations. It may be true if the full legal title to the money is in such third parties; but it is not true when his title is equitable rather than legal; and the right of these complainants as against the bank to the money deposited by their factor is equitable."

But in the case at bar, the legal title to the paper and its proceeds under the indorsement "for collection" was in the plaintiff, and he had no occasion to resort to a court of equity to establish his claim through the assertion of an equitable title.

The cases of

The Bank of Metropolis *v.* New England Bank, 1 How. 234.

The same case on second appeal, 6 How. 212.

Wilson *v.* Smith, 3 How. 763.

Sweeney *v.* Easter, 1 Wall. 166.

White *v.* National Bank, 102 U. S. 658, etc.

All involve precisely the same question that is involved in the case at bar, and all are actions at law, and the precise question was expressly adjudicated in the case of Wilson *v.* Smith, *supra*.

Respectfully submitted,

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